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# VALIDATING INFORMAL CONTRACTS

# HEARINGS

BEFORE THE

# COMMITTEE ON MILITARY AFFAIRS
# UNITED STATES SENATE

SIXTY-FIFTH CONGRESS

THIRD SESSION

ON

# H. R. 13274

A BILL TO PROVIDE RELIEF WHERE FORMAL CONTRACTS HAVE NOT BEEN MADE IN THE MANNER REQUIRED BY LAW.

WASHINGTON
GOVERNMENT PRINTING OFFICE
1919

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# VALIDATING INFORMAL CONTRACTS.

SATURDAY, JANUARY 11, 1919.

UNITED STATES SENATE,
COMMITTEE ON MILITARY AFFAIRS,
*Washington, D. C.*

The committee met, pursuant to adjournment, at 10.30 o'clock a. m. in the committee room, Capitol Building, Senator George E. Chamberlain presiding.

Present: Senators Chamberlain (chairman), Thomas, Johnson, Wadsworth, Weeks, New, Sutherland, Knox, Hitchcock, Frelinghuysen, and McKellar.

The CHAIRMAN. Gentlemen of the committee, there are some gentlemen here that desire to be heard further in reference to the bill validating certain irregular contracts, and Judge Cohen is here.

Senator WADSWORTH. I may say in advance of Judge Cohen's observations that in conversation with him yesterday, and some other gentlemen from New York who have been vastly interested in this problem and admit its difficulty—I gather that the bill which the committee reported the other day is a substitute for the so-called Hitchcock bill which is already on the calendar—that rather in reporting that bill the committee used an informal and incomplete copy, and that there were one or two rather important features left uncovered in the copy which we used as a basis for our report, and that the committee of gentlemen who had joined with others in Washington in drawing up that bill discovered that the copy which we used was incomplete, and there are at least two important omissions, and I think that Judge Cohen intends to address the committee upon the necessity or the desirability of including those eventually in any legislation which may be passed by the Congress. The parliamentary situation is somewhat difficult.

The CHAIRMAN. Yes, it is.

Senator WADSWORTH. There is nothing now before the committee in the nature of a bill. We have already acted on reporting the substitute, and if the committee decides to do anything toward amending and perfecting this bill as now reported on the calendar or to be reported on the calendar when the substitution is made, it would have to be, I told Mr. Cohen at that time, by amendment offered upon the floor.

The CHAIRMAN. Yes.

Senator WADSWORTH. However, that is a matter which the committee can take up after hearing Judge Cohen's remarks and arguments.

The CHAIRMAN. Before he starts, may I ask the clerk to go in and get several copies of the proposed substitute.

Senator WADSWORTH. I think it was privately printed, was it not?

The CHAIRMAN. It was printed later as a substitute.

Senator WADSWORTH. But I mean, as submitted to us, it was privately printed. But it was incomplete.

## STATEMENT OF MR. JULIUS HENRY COHEN.

Mr. COHEN. I have the suggested amendments in mimeograph form. They will all be here in a few minutes. They will be mimeographed, and at your pleasure I can explain the situation.

The CHAIRMAN. Judge, will you give the stenographer your name and address?

Mr. COHEN. Julius Henery Cohen, representing with Mr. Charles L. Bernheimer and Mr. Eugene H. Outerbridge, Mr. Bernheimer being present and Mr. Outerbridge detained in New York, the New York Chamber of Commerce. The New York Chamber of Commerce is known to the members of the committee as the oldest trade body in the country. It recently celebrated its 150th anniversary. It is not a chamber that is interested in the promotion of any business enterprises, or real estate enterprises, and has no interest whatever in any contracts of any kind, either by reason of having induced the Government to take any specific action, or by reason of the fact that it has any benefits to derive. About six or seven weeks ago the chamber of commerce, through Mr. Bernheimer, chairman of the committee on arbitration, and myself approached the Comptroller of the Treasury with a view to supplementing the existing machinery of the Government to facilitate the disposition of all claims that might be made and that would probably be the basis of parliamentary action on the part of Congress. We urged upon the comptroller the wisdom of his taking up the establishment of machinery, simple and expeditious, like the arbitration machinery that has been in existence in the chamber for many years, and that was being copied throughout the country by boards of trade and chambers. I mention that fact because of our entrance into this situation on the basis of procedural machinery.

At that time, the public, and I take it, Congress, were not aware of the unique situation that had developed, and the failure to comply with the provisions of the revised statutes. At that time we learned for the first time that there was likely to be legislation as to the outstanding orders and obligations which had not been made or reduced to writing in compliance with the terms of the statute.

We immediately set to work to adapt our aim for the establishment of modern machinery for the disposition of claims against the Government, to adapt that machinery to the existing War Department situation. We had various conferences with War Department officials and we were advised that Senators Hitchcock, McKellar, and Frelinghuysen had been appointed a subcommittee by this committee to meet the situation created through the invalidity of the contracts. We had various conferences with Senators Hitchcock, McKellar and Frelinghuysen, and with Members of the House. We found the Dent bill, so called, wholly inadequate. We found that

it did not validate the contracts and it surely did not provide any machinery by which business men could get prompt relief. We found the subcommittee of this committee to be unalterably opposed to vesting the complete power in the War Department to handle the situation. And we adapted ourselves to that point of view.

Senator Hitchcock was good enough, four weeks ago, to let me have the draft of the bill which he then was preparing for his subcommittee, and considered very carefully certain amendments which we suggested to him. One of those amendments was the amendment creating regional boards of examiners, which was our original conception of the method of disposing the vast mass of claims that will come to Congress on both valid and invalid contracts. And we hope that some day, Mr. Chairman, your committee will be gracious enough to give us a hearing on Senator McKellar's bill, which he introduced at our request, and which is the first suggestion of modern machinery for the disposition of all claims. We believe that we shall be able to convince you that it will relieve the Congress of a great deal of the legislation that will come up following this war if you immediately set up such machinery. But we succeeded in convincing Senators McKellar, Hitchcock and Frelinghuysen of the desirability of setting up such machinery in connection with these various cases and we found the point of contact between their feeling and ours on this line, that the Senators Hitchcock and McKellar did not wish to vest complete power in the War Department, and therefore we took the idea of the adjustment commission as worked out by Senator Hitchcock and supplemented it with the thought of the regional boards of examiners, and on the day that you were in session here, the hearing of Mr. Defrees and his colleagues, we were working to secure amendments to Senator Hitchcock's bill which would further perfect his bill.

Those amendments were printed by Senator McKellar and are available now. We also had taken steps to endeavor to induce the gentlemen in the House to adopt similar machinery for the disposition of these claims. We did not know that it was contemplated to introduce another bill entirely. And, as you know, Mr. Chairman, the War Industries Board bill had not been introduced in the Senate: it had not been printed, and no one had had advance notice that is was coming up before this committee. Our committee of the New York chamber, having participated thus far in the formulation of the Hitchcock bill, came into this hearing in the afternoon and we then, for the first time, learned of the plans to introduce the War Industries Board bill. We heard the discussion, did not participate in it, and received a copy of that bill. We immediately saw certain points in there that were subject to discussion and criticism, but we also saw this: We saw that you gentlemen were desirous of doing the fair thing with the business interests of the country; that you were also desirous of preventing any frauds being perpetrated upon the country; that you were desirous of avoiding by blanket the approval or ratification of any possible wrong doing that had been done, and we felt that you ought to have before you a united opinion from the business men of the country, not those interested directly in contracts, but those interested in the preservation of the credit situation and the employment

situation throughout the country. So, immediately after your adjournment, at the invitation of Mr. Defrees, of the United States chamber, the three differing and diverging elements of opinion among the business men held a conference at the offices of the United States Chamber of Commerce, and we agreed upon various things, and it is my business to tell you what we agreed upon.

The CHAIRMAN. That is by way of amendment to which bill?

Mr. COHEN. By way of amendment to the so-called War Industries bill. We had endeavored, as I said before, to revise Senator Hitchcock's bill in accordance with his main principle, but with certain amendments which would safeguard both the Government and the contractors. Those amendments we found were very much in accordance with the point of view of the gentlemen from the United States Chamber of Commerce and from other parts of the country, who were anxious over the situation. Our criticism of the War Industries Board bill first of all was this: That although it was your purpose, or the purpose of the majority of the Senate Military Affairs Committee to put the invalid contracts on the same level as the valid contracts, that was not accomplished by the bill, because the very first paragraph gives to the Secretary of War the determination of the life or death of that contract. On the second page, on lines 7 to 11, the waiver which is to be executed by the Secretary of War is to be given or withheld by him according as he finds that it is consistent with the public interest.

The legal situation to-day with regard to contracts which are equitably sound, concerning which there can not be a vestige of fraud or collusion, is this: That on account of the provisions of the revised statutes, provisions which are wholesome and which should be preserved, and on account of the great desire of officials in the War Department, and business men, to render the patriotic service that was exigent at the moment, cutting through red tape, even violating the Revised Statutes if necessary in order to win the war, on account of that, business men in good faith have obeyed what they regarded as commands from the War Department, and are in the position to-day of having no legal basis upon which to assert their claims, and no court to which they can go. The War Industries Board bill intended to put them on a fair basis, but it says that one of the parties to the contract shall have the sole determining voice as to whether or not those contracts shall be valid. I am not here to criticise the Secretary of War or the War Department. My feeling is one of respect, and in many cases admiration for what they have done; and we have stated to the War Department officials and to outsiders that we have absolute confidence in their desire to be fair. But on principle, and based upon human experience, I should say that there is not a lawyer in this room here who would advise his client to leave an invalid contract situation, the life or death of it to depend upon the equitable action of one of the parties to that contract. And that certainly was not the intention of this committee.

When we brough that to the attention of the other gentlemen who were here, they recognized the force of that position, and said, "What would you recommend?" We took this posision: We said that there was merit in position of those who opposed to the general vest-

ing of power in the War Department. We did not know of any cases of fraud or of collusion. I believe that there has been very little of it. But, nevertheless, just as, on the basis of general justice and experience, we felt that it was not right to leave it to the man who was the other party to the contract to validate or invalidate, so we felt that it was not right or fair that the entire situation should be closed or covered by a general validating provision. We said, "You are right, you ought not by that kind of legislation to cover up anything that has been done that is wrong." So we said to the gentlemen in the conference who had appeared before you that we thought this idea with regional boards was sound, but that instead of being the board or court of first instance it should be a body of review or appeal.

The argument against it that was made was that delay would take place in the settlement of all these claims; that the War Department had machinery already established for the disposition of these claims, and that if that machinery were permitted to function this matter would be closed up much more expeditiously than if you created new machinery and a new commission with these regional boards functioning throughout the country, and with the problem decentralized and distributed throughout the country. We thought there was merit in that argument and that in the procedure the machinery of the War Department should function, but somewhere there should be a remedy both to the Government and to the contractor who was not satisfied with the result. Otherwise, on the side of the contractor, it would have put him in the queer position of either taking what the War Department offered him, or having no remedy, because without the waiver granted by the War Department he was prevented, could not get anything, had no contract; he had no standing in any court; and on the part of the Government you had the opportunity for collusion without review. So, these gentlemen said then, "Will you draw an amendment which will meet that point?" So we took from the Hitchcock bill, in almost identical language the scheme of the adjustment commission, plus the scheme of the regional boards, and we added that as a section, and gave to either the War Department or the Department of Justice the right to appeal within 30 days from any settlement, and the right to the contractor to appeal for review within 30 days.

That seemed to us to harmonize the legitimate objections that had been raised to all the legislation then pending in Congress, the objection that it was not to fall on the side of the men who had contracts, the objection that it was not to fall on the side of those who were legitimately trying to protect the Government against any collusion or fraud. And we then said to the gentlemen, "If you will take that amendment which we think we can argue clearly with Senator Hitchcock and with the members of the House who have made criticisms, we will agree to substitute this amended bill in place of the Hitchcock bill." And so we did agree and that revised bill is now in shape to present to you. We were obliged to leave for New York in the afternoon, so could not remain for the perfection of the details, and I am afraid that the details did not come to you in time for your deliberation. But we now urge upon you that this substitute, which meets all the criticisms and objections which have been made from various quarters, should be put in place of both the Hitchcock bill and the War Industries bill.

Senator KNOX. Did you have an opportunity to present this bill to the House?

Mr. COHEN. No, because the Dent bill was passed before we could get that bill to them. But we also found, too, Senator Knox, that the disposition in the House on the part of those who wanted to validate the contracts was to center upon the Dent bill so that something could pass promptly, and they could get into conference with the Senate. And I think you will find when you go into conference that if you have a bill which you can stand for and argue for they will accept it in substitution for their own.

The CHAIRMAN. The parliamentary situation in the Senate with respect to the Hitchcock bill and the proposed substitute is a difficult one. The Dent bill, however, will come to the Senate Monday and will be referred to this committee. The parliamentary situation might be relieved if we had the Dent bill for the consideration of this committee.

Mr. COHEN. You can always move to strike out everything after the enacting clause and substitute another bill which carries out the intent and purpose of the original bill.

The CHAIRMAN. It is very hard to get at that, the way the matter stands in the Senate at this time.

Mr. COHEN. I think you should work on the basis of the bill which you reported the other day, which is susceptible of improvement with a very few verbal changes and with the addition of the changes that we have already prepared.

Senator KNOX. Have you endeavored to persuade Senator Hitchcock for the adjustment of this on the basis that you have suggested?

Mr. COHEN. We tried to see him yesterday, but he has gone to Omaha. But I think I understand his point of view. His point of view was that the War Department should not even have primary jurisdiction to settle these claims. But I think in the light of the discussion that has taken place we might persuade him that if the reviewing board was there the Government's interests would be protected, the contractor's interests would be protected, and we would have the expedition which now everyone agrees will be had, because the machinery of the War Department will function undoubtedly in most of the cases, and will function better, if you please, if the parties know that there is a place to go for relief in case anything unreasonable takes place. So that we come before you to-day with this bill worked out.

Now, however, difficult the parliamentary situation may be, the substantive situation is even more difficult, because it so happens that in the endeavor to do the right thing your committee has presented to the Senate a first draft, or printed draft, or so-called War Industries bill without the various detailed changes that were made to cover situations quite imperative. For example, your bill does not cover the relations with the foreign governments involving a very large sum of money, and it does not cover the changes in language necessary to make the provisions consistent throughout. That undoubtedly was due to inadvertence in the printing. But the situation on that bill is that it is incomplete and imperfect and therefore it becomes necessary to substitute in place of it something that is perfected.

Have you got the copies, Mr. Defrees, the mimeographed copies?

Mr. DEFREES. Yes.

Mr. COHEN. I would like to have them to distribute, if you can.

Senator JOHNSON. Mr. Chairman, would you let the clerk telephone to Senator McKellar, because he was quite as interested as Senator Hitchcock in the bill and it might alter his view, if he were here.

Senator NEW. If I might interrupt you, I think that the Senators ought to understand that this bill which Mr. Cohen is now suggesting should be substituted is the bill which you intended to report. In other words, it is the revised War Industries Board bill which we left with you, and confusion resulted because there had not been a printed portion, so that does not involve any change in the mental process, I am sure, that you went through, but there are added to it the sections providing for a system of appellate reveiew which Mr. Cohen spoke about. In other words, this revision of the War Industries Board bill is not a new thing; it is exactly what we discussed before when we talked the other day.

Senator WADSWORTH. It is what you said he was to consider when you reported a substitute.

Senator NEW. Yes; and it is what we did consider.

The CHAIRMAN. I knew there was going to be confusion about those bills. You gentlemen had three or four here in different forms, and there was just that confusion, probably. Senators, we might have that substitute bill referred back to the committee.

Senator WEEKS. I don't see why when the House bill comes over to the Senate they don't refer it to this committee and then treat that as a basis for legislation, strike out the enacting clause and insert what we think is a suitable bill.

The CHAIRMAN. I think that is the easiest way out of it.

Mr. DEFREES. I think that is the easiest and simplest way to proceed, Senator.

Senator NEW. What I would like to have you clearly understand is that the part which Mr. Cohen is now presenting, excepting the part providing for the board of review, is substantially the part that we asked you to consider the other day.

Senator KNOX. Do you entirely agree with Judge Cohen's presentation to the committee?

Mr. DEFREES. Yes; we do.

Senator KNOX. With the reasoning and the conclusions.

Mr. DEFREES. Yes. I see nothing in the reasoning. I am more impressed with the question of expedition. If this can be added I would regard it as a very great advantage to have, not only with respect to the Government, but with respect to the feeling of the country. There is a psychological basis, as it were, for the financial interests that are behind so many of these contracts.

Senator JOHNSON. When you this could be added, you mean the additional clause providing for an appellate court?

Mr. DEFREES. Yes, sir. I think the percentage would be very small, but I think it is important to have it added, and I see no possible reason why it should not be added.

Senator JOHNSON. Is that not at variance with the position we all took the other day concerning delay and repetition, at variance with the action that was desired?

Mr. DEFREES. It can not affect that.

Senator KNOX. It only provided for cases where a man was thrown out of court altogether?

Mr. DEFREES. Yes, sir.

Senator JOHNSON. No; I don't understand it that way.

Mr. DEFREES. Yes.

Mr. COHEN. May I answer that?

Senator JOHNSON. Certainly.

Mr. COHEN. Here is the situation at the present time——

Senator JOHNSON. Pardon me; is Senator Knox correct in that?

Mr. COHEN. Yes.

Senator JOHNSON. It only relates to the original action of the Secretary of War invalidating the contract?

Mr. COHEN. Oh, no, it relates to any disposition which the War Department may make, and may involve an appeal by the Government as well as an appeal by the contractor. But it also relates and primarily relates, because of its importance, to his action in either validating or invalidating the contract itself.

Senator JOHNSON. Relates to the amount of the award?

Mr. COHEN. Yes.

Senator KNOX. Then I am not correct?

Mr. COHEN. No.

Senator JOHNSON. As I understand their plan—I had a very interesting conversation with the judge yesterday—it is to take the plan that we agreed upon the other day to safeguard the contractor and the right of appeal of the Government as well, and to create an appellate court.

Senator KNOX. And that appeal should apply not only to the validity of his contract, but to the work under his contract?

Senator JOHNSON. That is my understanding.

Senator KNOX. If that is so, Senator Johnson, it would be subject to your suggestion that it contains some of the features of delay, but not nearly so many, because I think a great majority of these cases could be settled right there.

Senator WADSWORTH. The delay would arise from the voluntary act of the appellant.

Senator JOHNSON. That is true, and I think that is a pretty complete answer.

Mr. COHEN. That is the answer I was going to make.

Senator JOHNSON. The only suggestion I make in regard to that is that it puts a premium upon disagreement.

Mr. COHEN. I don't think so. Mr. Bernheimer has been chairman of the committee on arbitration for how many years——

Mr. CHARLES L. BERNHEIMER. I have been elected nine times.

Mr. COHEN. And the reports which Mr. Bernheimer has made to the Chamber of Commerce of New York are to this effect: that wherever there is in the contract an agreement to arbitrate differences it has been his experience that in 90 per cent of the cases he is able to conciliate the parties without going to formal arbitration. That is to say, the existence of a ready tribunal leads to the parties coming together.

Senator JOHNSON. That might be so in the case of the intimate relationship that exists between you and the gentleman who has just

spoken and those who are members of the particular organization; but it would hardly be so where that intimate relationship does not exist, and where you are dealing at arm's length, so to speak, in difficulties of this order. I am not speaking in opposition at all.

Senator FRELINGHUYSEN. I think that the practical suggestion of this, what the judge tried to accomplish, is this: I was on the subcommittee with Senator Hitchcock and Senator McKellar and was not in agreement with them as to their plan in the bill which they introduced, because I thought that the War Department had gone so far in the preliminary settlement of these contracts that not to use their efforts and their machinery would be foolish and expensive. I think the committee wants to accomplish this: after the Secretary of War has arrived at a figure in settlement of the contract, if the contractor feels that that award is not satisfactory, that he shall have a court of appeals between the Secretary of War and the Court of Claims. The process in the Court of Claims will be one naturally of delay and he wants to get quick action on an appeal. I don't believe that there will be many of those cases, but where they involve the intricacies of a contract or future production, I think that it is absolutely necessary if we are going to do justice to the contractor.

Senator JOHNSON. You may be entirely right. I won't say that you are not, but I think that you are probably providing machinery here that is going to do the very thing that we are seeking to avoid. You provide first an elaborate machinery. You provide for the appointment of a commission, one selected from the War Department, one from the Department of Justice, and one from the business interests. These men are to have $10,000 a year salary. They are to sit, you know, as a regular court. And I think you have provided—if you want it I have no objection; I want to get at this thing in the same spirit that you do, to have the thing determined with the least possible delay—but you are erecting now the very machinery that is going to do the very thing in my opinion that you are seeking to avoid.

Senator THOMAS. You will be bound hand and foot with red tape before the thing is two weeks old.

Senator JOHNSON. Here is a man from the War Department with summary power for immediate settlement. He knows that the business interests of the country are on tiptoe. He knows that the governmental agencies here like ourselves are on tiptoe to have this thing settled and settled at once. He is much more likely to say, when you have this elaborate commission, "Well, what is the difference? You have got a right of appeal. There is the decision. If you don't like it, appeal it," than he would be to be in a conciliatory attitude and make a settlement at once where there was no right of appeal. The restraint is on him of the exercise of an arbitrary power in one instance, and to say to the other fellow, as courts often say, "Well, if you don't like my decision you have the right of appeal."

Senator FRELINGHUYSEN. How would you arrange for an appellate court between the Secretary of War or the War Department and the Court of Claims? I have in mind one man who has a war contract of $5,000,000. Two-thirds of it is complete. Probably the loss of the profit on that contract or the settlement might involve him in disaster. The Secretary of War has arbitrary powers. He

simply says "You shall take that award." He has the choice of taking that award or going to the Court of Claims, which might take several years. Is it not reasonable to assume that we should have between the Court of Claims, the slow process and the arbitrary power of the Secretary of War, some authority, some tribunal, where he can go and get quick action?

Mr. COHEN. I know that case. The fact that the power of the War Department is final in that case is because it so happens that though that contract is signed, sealed, and delivered in every form it is invalid for lack of compliance with the terms of the statute, so that of course the War Department is final in that instance.

Senator JOHNSON. Well, you may be right.

Mr. COHEN. So it happens every time. You will get quick justice, but you will get grave injustice occasionally.

Senator JOHNSON. That is true. And there may be occasionally an injustice done by the system that we adopted the other day. But nevertheless the tremendous advantage that comes from immediate settlement will outweigh the disadvantages of the specific instances, few in number, where injustice may be done.

Mr. COHEN. They are not few in number. My point is that if you would leave the situation in its present shape you encourage—you use the point of expedition—the desire for expedition will result, coupled with the consciousness of final and complete authority on the part of the man in uniform—it will result in expedition, but it will result, I believe—and I submit for the record—in instance after instance of appeals to Members of the Senate and House for specific relief in individual cases, and in appeals to the Secretary of War to issue a waiver that he should issue.

Senator JOHNSON. If that be so, it will result in instance after instance to this new commission that you are creating.

Mr. COHEN. Well, it should. It is the best thing to do. Instead of burdening the Senators and Members of the House with consideration of the equities, you will have an appeal of that sort. Our position on the McKellar bill is that you should have a tribunal of that sort to which you should refer all claims. You have not got the machinery in this country for the disposition of controverted questions of fact. In England you have. Lord Bryce, at the meeting of the American Bar Association, pointed out that defect in our legal procedure, that where parliamentary relief was needed we do not have the legal machinery. And our main point for the Chamber of Commerce of New York is that sooner or later Congress must establish such machinery because of the exigencies that will arise out of the war. Now, with regard to delay, I don't believe there will be delay in those cases where the parties have gotten together. In many instances the contractors and the zone officers have come together and have got to the settlements now pending subject to your legislation. Certainly the contractors are not going to take appeals there. If they have arrived upon terms, they are glad to get their money and take it.

The CHAIRMAN. Does your bill as you propose it now utilize the machinery which the War Department has established?

Mr. COHEN. Certainly, sir.

The CHAIRMAN. All of it?

Mr. COHEN. Certainly. That is the substantial difference between our bill and the bill as it was in the final Hitchcock bill. Because in Senator Hitchcock's bill you could not get anything until that commission had passed upon the claim, and all of those claims had to go through the filtration process of the adjustment commission before you could get a penny. Here you can take your settlement of the War Department if you are satisfied with it, and you have got knowledge on the part of the department officials that if they do not settle there is a court somewhere that you can go to and get what you are entitled to. But it does not seem to me that that is going to involve delay. It is going to expedite. And, Senator, again while I am on my feet, may I, in connection with your answer to Mr. Bernheimer, say that the Chamber of Commerce of New York has not been settling trade disputes between its own members, where they have the power of a body over its own members, but it has been settling disputes between foreign Governments and the business men in the city of New York and between business men who are not members of the chamber at all; and it finds the same principle applies, that if you can have quick examination of the facts the parties can get together very promptly.

Senator JOHNSON. Are the members of the committee familiar with the provision relating to the new appellate court that is to be created?

Senator THOMAS. No, I am not.

Senator JOHNSON. I will read it. It is section 3. [Reading:]

SEC. 3. That a commission is hereby created and established to be known as the war contracts appeals commission (hereinafter referred to as the commission), which shall be composed of three members, who shall be appointed by the President by and with the advice and consent of the Senate, and shall continue in office for one year from the date of this act. One member of the commission shall represent the War Department, one member shall represent the Department of Justice, and one member shall represent the business interests of the country. None of the members of the commission shall be interested in any order, contract, or agreement within the purview of this act or have any interest in any firm or corporation having such orders, contracts, or agreements. Each member of the commission shall receive a salary of $10,000 a year, payable in the same manner as the salaries of judges of the courts of the United States. The commission shall choose a chairman from its own membership, and may appoint a secretary, who shall receive a salary of not exceeding $5,000 a year, to be determined by the commission and payable in the same manner as the salaries of the members of the commission.

What does the Supreme Court receive, by the way, Senator Knox?

The CHAIRMAN. $13,000.

Senator KNOX. $13,000.

Senator JOHNSON (continuing reading):

That there is hereby appropriated for the purpose of defraying the reasonable expenses of the commission, including the payment of salaries herein authorized or of any money in the Treasury of the United States not otherwise appropriated, available immediately and until expended, the sum of $50,000. That within thirty days of the date when the Secretary of War tenders any contract or compensation as provided in this act, or refuses to tender such contract or compensation, the Department of Justice or the party to whom said contract or compensation is tendered may file with the chairman of the commission a notice of appeal. Thereupon, the commission shall proceed to examine and review the facts and circumstances of the case and make its award or finding thereon. Upon giving receipt in full of all demands against the United States arising out of the transaction by reason of which the award is made, the appellant shall be entitled to receive the amount of any award so

made, and the proper officer of the United States is hereby authorized and directed to pay the same, but if the appellant is dissatisfied with the amount so awarded he shall be paid seventy-five per centum of the amount awarded and shall be entitled to sue the United States in the Court of Claims to recover such further sum as added to said seventy-five per centum shall make up such amount as will be fair and just compensation as provided in this act—

So that, you observe, you give not only the right of appeal, you create a new appellate court, but you give them a second right of appeal as well on the payment of 75 per cent—

and the Court of Claims is hereby given jurisdiction to hear said suit and render judgment therein. That in executing the duties and powers conferred by this act the commission may make its own rules and regulations and may hear and determine issues informally. It shall be the duty of the Secretary of War to furnish to the commission such evidence, documents, or papers pertaining to transactions as to which notice of appeal has been filed, as the commission may request. The commission is authorized to appoint one or more regional boards of examiners to serve in such districts as the commission may designate. Each of such boards shall be composed of a nominee of the War Department, a nominee of the Department of Justice, and a member from the business interests of the United States who shall, when such region is within the United States, be a resident of the region, none of whom shall have any interest, directly or indirectly, in any contract or transaction coming before said board or receive any compensation save and except such a per diem compensation and expenses as shall be fixed by the commission.

Senator WEEKS. May I put in "not to exceed $10 per day"?

Mr. COHEN. Yes, that was our original suggestion, and we simply took the salaries from the Hitchcock bill.

But this point is true; that if a man has a valid contract to-day where no waiver is signed, he has the right to go to the Court of Claims, but under the bill as you have reported it he has no right to go to the Court of Claims, because he has not got the papers signed, and it is contrary, I believe, to the spirit of this committee to leave him with no relief anywhere. There is no process whereby you can mandamus the Secretary of War to execute the waiver. There is no possible proceeding in equity. You can not go before the Court of Claims because they have no jurisdiction to handle such cases. I want the committee to understand that so far as our point of view is concerned the details of the machinery are mere details, so far as we are concerned. It is the principle that we stand for. If the details of the machinery are in the opinion of the committee too elaborate, we took them from the Hitchcock bill, because we thought that would be most acceptable to the committee. If there are needed checks to prevent too cumbersome machinery, it should be revised; but we do not think it is too cumbersome; we think it is simple. We think it will dispose of the business very promptly.

The CHAIRMAN. Let me ask you. I see by this last section you authorize the commission to appoint regional boards.

Mr. COHEN. Yes.

The CHAIRMAN. Will they not conflict with the functions the Secretary of War has already established?

Mr. COHEN. No, because they only act in review after the matter has gone through the processes of the War Department, and they have this difference; that they are not in uniform; they are outside; and they are not subject to the rules and regulations of the War Department. They will perform the function of reviewing upon the reference of the commission in case of injustice.

The CHAIRMAN. When the commission feels it is necessary?

Mr. COHEN. Exactly. They do not have to act. On the presentation of the papers to the commission the commission cay say either that the War Department is right, or the Department of Justice is right, and that is an end to it, except the man can take his 75 per cent and go to the Court of Claims, and if the commission does not award him in the first instance the waiver which he should have got from the War Department, he has not even got any legal right to go to the Court of Claims.

Senator SUTHERLAND. Is the appeal, from the regional boards that the War Department has established to the regional boards that you establish by this bill?

Mr. COHEN. In effect, yes, sir; but the process is: The regional boards do not take any argument or hear any testimony. The real board is the War Department Associate Board. That board is made up of splendid gentlemen; I know some of them personally. They are in uniform, subject to the orders of the War Department. I am sure they mean to act fairly. But the business community has not confidence that that kind of machinery will function always with equity and justice to the business men.

Senator SUTHERLAND. I think you are right about it.

Mr. COHEN. That is our main point. And the business community of New York does not feel that a system of legislation, which vests in one of the parties to an obligation the power of life or death of that obligation is a fair system of procedure.

Senator SUTHERLAND. I think, though, it is likely to go both ways; that it may be too elaborate in some cases, and possibly not fair enough in others.

Mr. COHEN. Right. Before you came into the room I said that our position was that there was merit in the proposition made to vest absolute and complete authority in the War Department, both in the objection of the contractor and in the objection of the Members of Congress who saw the danger covering it in principle. As I said, I did not believe that there was real danger, but it was based upon experience and principle, just as our objection was, so it seemed to us that there should be a board of review somewhere to which the Government could appeal if it was not satisfied. So we put in a provision that within 30 days the Department of Justice could take an appeal, and if any contractor has knowledge of any collusion he can bring it to the attention of the Government. It seemed to us that the business men of the country could not come before you and ask you for a proposition that was not fair to the Government as well as fair to themselves. And it seemed to us that it was indefensible to maintain a proposition that gave to the Government the final and conclusive say not only as to whether a man should have any money, but also as to whether or not he should have any lawsuit anywhere, because without that waiver all that the zone officers need do is to report to the Secretary of War that in the public interests the waiver should not be executed in this case, and he will refuse to grant it.

I said to some of the Senators, "Suppose it were an ordinary business transaction and you were the president of a great insurance company and I had $1,400 or $1,500 worth of premiums on a policy.

Under section 1414 I find that the policy is not valid, as it is not signed by the president or vice president, and I have a little claim against you. Before I begin discussing it with your claims department, I walk over to you and I find that this policy has not got the signature of an officer of the company. I say, 'Put your signature on there.' Suppose he refuses until I adjusted my claim with the claim department; the claims department says, 'This gentleman is entitled to $1,500,' and the officer says 'I want $100, and I won't sign this unless I get it.' I say 'Give me a chance. Sign your policy and then I will fight out the issue of my claim, on a valid policy, not on an invalid policy.' 'No, we won't do that.' What kind of a reputation would that insurance company have in this business world, and how could they go on and do business?"

Senator SUTHERLAND. I understand the bill as passed by the House made a provision which would increase the entire amount to about $3,000,000,000.

The CHAIRMAN. That House bill is not satisfactory to the business element nor to the Government itself.

Senator SUTHERLAND. Is it not true that they included contracts made with foreign governments which would increase it to, as I recall, $2,700,000,000, and with that amount of money involved it seems to me you have got to have sufficient check somewhere to safeguard the expenditure of that sum of money?

Senator KNOX. The consideration which has considerable weight with me is this: That the necessity for celerity here, prompt action, so far as the financial world is concerned, is pressed upon us by business men, and the objection that this plan they propose may involve delay coming from them—if they are willing to take the risks on the amount of delay that might be occasioned under this system, I don't see why we should complain.

Mr. COHEN. We don't believe there will be any delay. May I beg here to put Senator McKellar in touch with the situation? I said, Senator, in your absence, that I had conferred with you and Senator Hitchcock while you were engaged in the process of developing the other bill, and that we recognize the merit of the criticism of the plan of placing absolute and complete authority in the War Department.

The other day when that War Industries Board bill came in we were not heard, and when the bill came out we found that that principle on your side as well as on ours had not been put in the bill they had, so we suggested to these other business men in a conference that in fairness to the Government as well as to the contractors, there should be a ready tribunal somewhere to review the action of the War Department both to prevent fraud and collusion and also to prevent arbitrary action on the part of the War Department; not that we believed there was any collusion, or that we believed there was any arbitrary action, but because human experience taught us that such things would take place whenever arbitrary power was vested, and because the men who had lent money on the basis of these contracts would feel more secure if they knew it was not left to the final determination of a man in uniform as to whether there was life or death in the contract.

Senator MCKELLAR. I think you are entirely right, Mr. Cohen.

The CHAIRMAN. Suppose we take up the bill now and consider it in this connection. The Dent bill will be referred to us on Monday. It has already passed the House. Let us take this up in connection with the proposition of offering this bill or some other as a substitute for the Dent bill.

Senator WEEKS. Before you do that I would like to ask Mr. Cohen one question. May the committee assume that you and Mr. Defrees represent all business interests in the country as far as you know?

Mr. COHEN. That is a very broad assumption, Senator.

Senator WEEKS. So far as you know?

Mr. COHEN. Mr. Defrees represents the war congress of executives who have been dealing with war contracts and is an officer of the United States Chamber of Commerce and represents all of the merchants and boards of trade throughout the country. We can only speak for the Chamber of Commerce of New York, whose voice has been heard with respect on previous occasions. The other gentlemen who come here from Cleveland represent practically and substantially all of the large contractors who have Government contracts, and they have been in conference with their lawyers both here and in New York, and I think we have come to a unanimous conclusion as to what is the desirable and fair thing. I do not say that we represent all the business interests of the country; that would be arrogant on our part, but I think we express the vocal point of view because we are the only ones who have followed the question with this degree of detail. We have been here now on occasion, as Senator McKellar knows, rather persistent in the presentation of our point of view before you in the War Industries bill, and I think it can be said that in New York City at least, where there has been consideration of this matter, we express the point of view of that city.

And Mr. Defrees can tell you to what extent he represents the commercial view of the country. Mr. Dineen, as counsel for the contractors' association, can tell you to what extent he represents that. You may judge, then, for yourself, how far we represent unanimous opinion.

The CHAIRMAN. Mr. Dineen, will you be heard?

Mr. DINEEN. If you please.

## STATEMENT OF MR. HENRY H. DINEEN.

The CHAIRMAN. Your address, and your representative capacity, if you please.

Mr. DINEEN. Maryland Trust Building, Baltimore. I am the temporary secretary of the Association of Manufacturers of War Materials, which was organized about 10 days ago, and for some 13 months I have been the secretary of three voluntary associations of manufacturers who were engaged in making the component parts of all the artillery ammunition for the Government—that is, the shells, the fuses, and the booster and the adaptor—and as such I was thrown into intimate contact, I may say, with the heads of the various sections of the Ordnance Department, and my office was a clearing house for all the statistical data, the information and things of that kind between the manufacturers of those parts and the Ordnance Department.

And I will say for the information of the committee that during the past 13 months at the request of the Ordnance Department there have been over 100 meetings held in various sections of the country at which all of the various manufacturing interests engaged in the manufacture of that part or those parts sat around the table just as we do here with 15 or 20 representatives of the Ordnance Department, 50, 60, or 70 representatives of manufacturing interests, such as the Wellington Pump, the American Can, the S. A. W. Woods, the Symington interests, and similar industries, Butler & Haywood, and so forth. What I want to say is this: That these informal contracts were born of situations like this: We would be sitting in a room; one of them would be called to the telephone and the Ordnance Department would give him an order over the phone—this was in the critical days of last May or June—and he would say, "Men, for God's sake, give us ammunition. I have just received a Government contract. Give us ammunition. Pershing is cabling for it. Don't stop to wait for anything, but turn it out." And they would call the roll and each man would be asked to tell what he could do regardless of his contracts. And they went ahead. When this situation broke and we were met with the rule that equitable contracts were not legal contracts, the manufacturers of the country were in this position; in Cleveland alone 50,000 laborers will probably go out on the 1st of January.

Mr. SUTHERLAND. What do you mean go out; go out of employment or on strike?

Mr. DINEEN. No; go out of employment. I will explain in a moment. In Detroit alone 20,000 went out on Monday for this reason: Take the Packard Motor Works; the Government has their money tied up. They have those Liberty motors in process of manufacture. They have factory on factory of wings and other things, and they can not get any place to send them. They can not get other war work, because the Government says "We won't recognize our business obligations." Capital is tied up there and we don't want your war work profits. They can not get into peace work because their capital and their surplus is all out. Their energies and their capital are tied up in this way and, therefore, being unable to get out of war they can not get into peace, and they can offer labor nothing. In Cleveland, Detroit, Cincinnati, St. Louis, Toronto, Boston, and New York, they look at it from another point of view. I say this as a member of the Baltimore Liberty loan committee who nearly yelled my head off selling bonds on the fourth loan: That when we had the Germans driven back from Chauteau Thierry, we had the devil's own time selling $5,000,000,000 worth of bonds, and now the Senate is going to ask the country next April to subscribe an equal amount. Labor has no job. Then we are going to build on that.

Senator THOMAS. I don't think this impresses upon us the importance of this matter.

Mr. DINEEN. Our point is, and we represent practically all the manufacturing interests in Government material, that we want two things; we want these contracts validated and we want speedy relief.

Senator JOHNSON. We are all agreed on that.

Senator WEEKS. If we adopt this machinery which has been outlined, Mr. Cohen, will the business men of the country have any reason to complain if there is delay as a result of its adoption?

Mr. DINEEN. No; they will not, because I think there will be delay only in probably 2 per cent of the cases.

Senator WEEKS. And you are satisfied that those with whom you are associated would be in favor of the adoption of that kind of machinery?

Mr. DINEEN. Yes; for this reason, that these local regional boards now functioning as the machinery of the Government are familiar with the atmosphere that exists in each locality, and they can get around the board together, and as business men they can settle this thing. The automatic validation of contracts will unloosen the money and they will be in the position to pass quickly from war to peace, and for that reason we are in accord with any legislation which will give us relief.

The CHAIRMAN. You avoid the question that Senator Weeks put to you. You say that you are satisfied with any legislation that will give you speedy relief. But suppose the last clause of this bill results in some delay; are you still satisfied with this form of bill?

Mr. DINEEN. Yes, we are satisfied with this, because once the pulse of the public——

Senator THOMAS. We don't care anything about the reasons. If you are satisfied, we are.

Senator WEEKS. I think what we want is to have these other gentlemen say that they are satisfied with what we have recommended here, particularly with the standpoint of the possible delay that may result.

Mr. COHEN. I think we have hardly any doubt about that. We are all satisfied.

Mr. DEFREES. Mr. Dineen represents, as I understand, practically all the Ordnance war contractors in the country, and many others, and subcontractors as well. The war service executive committee, of which I am chairman, represents practically 90 per cent of the industrial interests of the country, and therefore 90 per cent in that sense of the labor of the country which is involved in this situation. We all agreed upon this paper as put to you. But please keep this exact paper, because there have been other things suggested.

The CHAIRMAN. You are measurably to blame for that.

Mr. DEFREES. Certainly. I am taking the blame, and I am trying to see that we shall not have occasion to have more blame put upon us.

Senator MCKELLAR. I call your attention to section 3 of the substitute amendment that was reported out yesterday, I believe, by the committee as a substitute for the bill formerly reported out. Have you any objection to that going in? I will just let you read it.

Mr. COHEN. That is the affidavit?

Senator MCKELLAR. The affidavit provision. It is in the law now, that there are some contracts that the Government ought to be guarded against. No contract that is honest need worry. And there are dishonest contracts that will be looked after on a quantum meruit.

Mr. DEFREES. We thought of that in the preparation of this. First I will say that if it is the desire of the committee that that be added, we would like to suggest a small amendment to it.

Senator MCKELLAR. What amendment?

Mr. DEFREES. Just a minute. We thought that the Government's right of appeal involved in Mr. Cohen's additional section probably conferred the relief that you wanted.

Senator MCKELLAR. That is the law now, substantially.

Mr. DEFREES. The difficulty is twofold; in the first place a very great many of these contract officers are no longer in the service of the Government, and therefore it would be very difficult and involve more or less delay, we thought, to get their oath as required.

Senator MCKELLAR. You might have to get their oath before you get the contract. In other words, are you going to validate a contract—take it this way: Suppose the officer is away and the Government has no means of knowing whether that officer ever gave a contract to a contractor: do you mean to say we are to validate a contract on the mere statement of the contractor that he did have a contract with the Government?

Mr. DEFREES. Absolutely not.

Senator MCKELLAR. It is absolutely necessary to have something like this.

Mr. DEFREES. It would not lie in our mouths very gracefully to debate against any protection against fraud on the Government.

Senator MCKELLAR. It struck me that after Senator Knox amended it the Senator very wisely, as it seemed to me, put a provision in there that I think just takes away any possible danger of wrong to any contractor and at the same time protects the Government. In other words, we must know from some officer of the Government—and the best one is the one who made the contract himself—that this contract existed.

Mr. DEFREES. We do not object to that being added.

Mr. COHEN. May I make a suggestion that has just occurred to me, that I think Senator McKellar would accept? If that were referred to the Commission instead of to Congress, you would save yourselves a large amount of valuable time.

Senator MCKELLAR. I am perfectly willing to let it go to the commission. You understand it was put in here because we had no commission. We made a try for the commission and did not get it, and then we had to put Congress in.

Mr. COHEN. That meets the entire situation.

Senator MCKELLAR. If it will suit Senator Knox it will suit me. We will just add the words "to the commission aforesaid," instead of "to the Congress."

Mr. COHEN. In line 12, page 4, of Senator Chamberlain's substitute, substitute in place of the words "to Congress" the words "the war contracts appeals commission aforesaid."

Mr. DEFREES. We are going to be in danger, because that refers to this.

Senator MCKELLAR. I am going to offer it as an amendment.

Mr. DEFREES. If we will have a chance to see to it that we get the exact thing we are talking about.

Mr. COHEN. We will work that out before we leave. Those of us who have been on the task realize that you gentlemen have so many important and pressing problems that the details of procedure and protection of rights ought really to be considered by the lawyers who have given thought to the matter.

Senator THOMAS. That is it. It is your specific business to consider the form of the bill, and we have so much business—I have a multitude of details. I have not been able to attend to my mail for four days.

The CHAIRMAN. There is another thing. We struck out of this bill when the substitute was proposed that provision which had reference to lands, but I see it is in the bill which has been submitted by Mr. Cohen. I think you will notice on the second page of his mimeographed bill this:

And whenever, prior to said November twelfth, nineteen hundred and eighteen, any individual, firm, company, or corporation has made any agreement, verbal or written, with, or has received any order, oral or written, from the Secretary of War, or any office, agent, or agency as aforesaid, for any of the purposes aforesaid, and the same has not been reduced to contract form, but such individual, firm, company, or corporation has in good faith made expenditures, incurred obligations, furnished equipment, materials, or supplies, or rendered services, in reliance on such agreement or order, in every such case the Secretary of War is authorized and directed, on behalf of the Government, to enter into such contract with such individual, firm, company, or corporation as will, under all circumstances, fairly and equitably compensate him or it for the expenditures made, obligations incurred, equipment, materials, or supplies furnished, or services rendered, as aforesaid: *Provided*, That in no event shall such contract provide for prices more favorable than the prices for which the aforesaid agreement or order may have provided.

And whenever, prior to said November twelfth, nineteen hundred and eighteen, the War Department, through its officers or agents has taken possession of any land, then the Secretary of War, if he finds that the public interest does not require the possession or occupancy of such land by the Government is authorized to make compensation to the owner or holder thereof, for the fair value of the use of such land while in the possession of the War Department, and for any expense or loss incurred by the owner or holder by reason of such possession.

Doesn't that provision authorize the Secretary of War in his discretion to pay for the land?

Senator MCKELLAR. I think it does, and I don't think it ought to be done.

Senator THOMAS. I have an amendment that I prepared of the whole thing. I will go and get it now. I reserved the right to introduce it on the floor.

Senator SUTHERLAND. I think we want to be careful not to give them power to close up, for instance, those deals down there without an express sanction.

Senator WADSWORTH. This bears directly on that Columbus (Ga.) proposition.

The CHAIRMAN. That is why I am calling the commission's attention to it.

Senator JOHNSON. Have you gentlemen any interest in this particular paper?

Mr. COHEN. Not any at all: but, as I listened to the discussion yesterday while waiting, on the Georgia situation, it seemed to me that this representated the general attitude of the committee toward such situations.

Senator JOHNSON. I was going to suggest that if you are not concerned with this particular matter the Georgia situation has not been concluded as yet, I imagine, and no decision has been reached about it.

Mr. COHEN. We won't press for that.

Mr. DEFRESS. I think you ought to understand that what we presented here is the revised War Industries Board bill with the Cohen sections added for a board of review, and that that was in there, and we did not strike it out because we saw no objection to it ourselves.

Senator JOHNSON. Concerning the third section, I want to say that it was with great reluctance that we created this new court, as far as I am personally concerned. And I intended to present this to those in the War Department who are more thoroughly familiar with the situation, and I intended to obtain for myself their opinion on the particular provision.

Mr. COHEN. That is, the provision with regard to the lands?

Senator JOHNSON. No, the provision with regard to the creation of an appellate court.

Mr. PAUL BOGART. Secretary Crowell said the other day that this war industries bill would be acceptable to the War Department. It did not have the appeals commission added.

Senator THOMAS. I have prepared this—it is rather crude, I imagine, because I prepared it hurriedly, this proposed substitute for section 2, after it had been amended.

The CHAIRMAN. For the whole section?

Senator THOMAS. Yes; it is practically a reproduction of the section, so far as concerns everything except my proposed amendment. I just wrote out the whole thing, using that as a basis.

The CHAIRMAN. That is the third paragraph of section 1?

Senator THOMAS. Yes; it is the section preceding section 2.

And whenever prior to said November twelfth, nineteen hundred and eighteen, the War Department through its officers or agents has taken possession of any land, or whenever the holder or owner of any land has removed from or removed any improvements from such land at the order or request of the War Department, its officers or agents to turn over the same to the War Department and no valid contract has been made with respect thereto, then the Secretary of War, if he finds that the public interest does not require the possession or occupancy of such land by the Government, is authorized to make compensation to the owner or holder thereof for the fair value of such improvements so removed, and the expenses incurred by such owner in removing therefrom or for the fair value of the use of such land of which the War Department has taken actual possession and for any expense or loss incurred by the owner or holder by reason of such possession.

Senator MCKELLAR. Should not the same right of appeal be applied to that?

Mr. DEFREES. It is.

Senator MCKELLAR. Your bill will cover that?

Mr. COHEN. Covers all these cases.

Senator WADSWORTH. While we are in open session, I wanted to ask: There was a brief explanation from the gentleman before us as to the necessity for the creation under this bill of reginal boards. In view of the fact that the War Department already has regional boards, are they essential to the proper working of your appellate system?

Mr. COHEN. I should say that if this required and made imperative the creation of regional boards there might be serious question about it; but it merely authorizes the commission to create regional boards, and they do not need to create any until they see whether the business is of sufficient quantity. And as we proposed these boards would serve with practically no compensation,

so there is no pecuniary motive to create them. We had in mind the creation of tribunals along the line of arbitration tribunals throughout the country. But if, as now seems to be the point of view, there will not be many cases, then the regional boards need not be created any oftener than examiners are appointed by any commission.

Senator WADSWORTH. It is your idea that these regional boards, created in the discretion of the contracts appeal commission, would be used by that commission to obtain information independent of the information already obtained by the War Department's regional boards?

Mr. COHEN. Yes. That is to say, at the present time the contractor has not a chance to make a record. He has not a chance to argue his case out before an impartial tribunal.

Senior WADSWORTH. Under your bill could he not argue it out and make a record before the contract appeals commission?

Mr. COHEN. Yes, and if this commission had only five cases there would be no reason for creating a regional board; but if they had 500 cases and it gets clogged up they can create these regional boards. They are not obliged to create them. That argument we went through with Senators McKellar and Hitchcock on their bill. Senator McKellar argued with some force that under their bill as it had been drawn the regional commission would have power to appoint examiners, but we wanted that authority vested clearly, and so we succeeded in getting that into their bill.

Senator SUTHERLAND. There is no limit to the number of regional commissions they can create under this bill?

Mr. COHEN. No; there would be no limit except the business they would have and their appropriation. They have no appropriation except $50,000.

Senator JOHNSON. These regional boards are investigating boards?

Mr. COHEN. Yes.

Senator JOHNSON. Are not courts of appeal?

Mr. COHEN. The court of appeal is the war contracts appeals commission. The regional boards are merely fact-gathering agencies for the purpose of reporting the facts with their recommendations, exactly in the same fashion as the auxiliary capital issues committees throughout the country serve the Capital Issues Commission in Washington.

Senator JOHNSON. That is an anomalous situation, I submit to the committee. We have your regional board of the War Department, that is to determine this matter, investigate the facts, and to gather them together and the like. You authorize now another regional board to do exactly the same thing.

Senator MCKELLAR. In such case as the commission may see fit.

Senator KNOX. The regional board that is now in existence as I understand, gathers facts and reports to the War Department for the original decision. These people perform the same function for the commission of appeals.

Senator SUTHERLAND. Independent of the War Department?

Senator WADSWORTH. In general, what is the character of the personnel of the present War Department regional boards?

Senator THOMAS. That was stated here by the Secretary of War.

Senator MCKELLAR. All one? All officers?

Senator WADSWORTH. All military officers.

Senator MCKELLAR. All military officers.

Mr. CHARLES L. SYMINGTON. I am president of the Symington Machinery Corporation, of Rochester, N. Y. The present boards are almost entirely headed by men who have had very broad business experience, not necessarily in any way interested in these contracts. The head of our board in Rochester is Mr. Nobel, the vice president of the Eastman Kodak Co., and associated with him are several gentlemen who are not in uniform. That board is almost entirely a civilian board. In Chicago, Mr. John J. Mitchell, president of the Illinois Trust & Savings Bank; Mr. Russell, formerly vice president of the Otis Elevator Co.; and throughout the country the boards are constituted—they are made up, rather—of men who have had practical experience with the contract from a production standpoint, and the board is headed by some man in the community who has a reputation as a financier or business man, and whose interests are not selfish in any degree. The reason the association of manufacturers, which was organized in Cleveland for the purpose of getting some light on this question and showing you gentlemen what the manufacturers directly want to do—the reason that committee is in favor of the War Department machinery is because that machinery now is functioning to the entire satisfaction of the manufacturers. Ninety-five, I might even say 98 per cent. I have not the exact figures, and I do not want to exaggerate, but a very large percentage of the contracts to-day could be cleaned up within two weeks after this bill or some proper remedial legislation is enacted. Why? Because the money has been——

Mr. COHEN. You were merely asked to tell the character of these regional boards, and I don't think you are answering the Senator's question. He asked you how they are made up.

Senator MCKELLAR. Are not all these regional boards directly under the direction of the War Department, the military authorities?

Mr. SYMINGTON. Yes.

Senator WADSWORTH. They are appointed by the Secretary of War?

Mr. SYMINGTON. Yes.

Senator WADSWORTH. And they consist in part, at least, of civilians?

Mr. SYMINGTON. Yes.

Senator WADSWORTH. And they are headed very generally by civilians?

Mr. SYMINGTON. Entirely. Every district claims board—there are 34 of them; I do not know exactly.

Mr. COHEN. Thirty-four.

Mr. SYMINGTON. They are all headed by civilians who are not in uniform.

Senator WADSWORTH. Then the preponderating influence is a civilian influence?

Mr. SYMINGTON. Yes, sir.

Senator WADSWORTH. Then the Secretary of War, or whoever appointed them, must have made up its mind that the Government could rely on their information. Then why can not the contract appeals commission rely on their information also?

Mr. Symington. From the manufacturers' standpoint, I entirely agree with you; but Mr. Cohen seems to think I agree with Senator McKellar and Senator Hitchcock that these regional boards would be advisable to have. We have no objection to them.

Senator Wadsworth. Because you are not concerned particularly about them.

Mr. Symington. We are not concerned.

Senator Wadsworth. But as a matter of public policy I wonder whether we are not duplicating effort?

Mr. Cohen. I think, Senator, if I may be permitted to answer that question, it is our point of view that we have this feeling; that the men who are acting on these regional boards are working under definite rules and regulations promulgated by the War Department. They report to a contract adjustment commission made up of men in uniform who are subject to the orders of the War Department and can be removed at any minute and transferred by the War Department; that they follow the policies of the War Department; that it is true that in many instances, because they are familiar with the facts, they will be able to do justice speedily. But the business community feels that there should be a place to go to in case any of these gentlemen, following the rules of the War Department, misunderstanding them, perhaps, either refuse to give the waiver that is essential to the validity of the contract, or refuse to give an award that is fair.

Senator Weeks. Well, Judge, you have a place to go to in the court of appeals.

Mr. Cohen. Under our bill.

Senator Knox. But the judge's idea is that the court of appeals ought to have the machinery to get at the facts themselves.

Mr. Cohen. Exactly.

Senator Knox. It is exactly analogous to a master in chancery.

Mr. Cohen. Right.

Senator Knox. The court of appeals may appoint an additional master to get at the facts, to satisfy themselves.

Mr. Cohen. There is absolutely no necessity for this additional board to go over the same ground that has been gone over by the regional board in the War Department. They take that record as a beginning. But the contractor says the failure of this board is that this and that fact was not brought to their attention. He desires now to put in evidence on that. And all that is done is that instead of a one-sided inquiry—I say in principle—I do not say in intent—you have the opportunity for a two-sided inquiry, for a commission that is responsible to nobody—except its own honor and conscience.

Senator Knox. And the business man who suffers from the delay is the man to invoke that?

Mr. Cohen. Exactly. And my additional point is that the existence of power to create these regional boards will result in a much fairer consideration of the cases in the first instance, as always is the case with a trial board or court that knows there is a possibility of review. But at the present time no records are made except the records of the report of the war officer.

Senator THOMAS. These commissions will tend to increase the expense of administration very considerably.

Mr. COHEN. But the limit of expense is in the bill.

Senator MCKELLAR. Why talk of $50,000 expense when there are $3,000,000,000 of contracts?

Senator THOMAS. I am not talking about it at all. I simply say we will have to make provision for it.

Senator MCKELLAR. That will depend upon the recommendation of the commission after they get started, because under this bill they have a right to appoint or not as they see fit.

Senator THOMAS. I am not objecting to it particularly. I think you are going to duplicate your work.

Senator WADSWORTH. I perhaps laid too much emphasis upon it. I do not regard it as vitally important one way or the other, but I am not a lawyer; I don't know.

Senator KNOX. If this is what the business men want, I am perfectly willing to let them have it.

Senator THOMAS. So am I.

Mr. DEFREES. Some of us have larger views than others, but we all want to do what is right.

The CHAIRMAN. There is one thing we have not disposed of, and that is that real property section. I think we ought to modify that a little. I think that gives the War Department power, where it has taken possession of any land or improvements on it, the discretion to buy it——

Senator THOMAS. You mean that amendment of mine?

Senator WEEKS. These gentlemen are not interested in that particular matter, and I was going to suggest that the committee go into executive session now, if that meets your approval.

Mr. COHEN. We will sit outside and be prepared to help you.

Mr. DEFREES. I would like very much to be sure that we get everything to you.

The CHAIRMAN. We want to end it some way.

Mr. DEFREES. If we can take those copies we can put the amendment into each one to make it exactly what we want it to mean to you.

The CHAIRMAN. You can do it if you want to.

Mr. Bernheimer wants to make a statement.

## STATEMENT OF MR. CHARLES L. BERNHEIMER.

Mr. BERNHEIMER. I am chairman of the arbitration committee of the Chamber of Commerce of New York. These regional boards, Mr. Chairman and gentlemen, are fact-determining agencies that are as flexible as we take it to be is our financial system of the country. That is, they contract or expand as the necessity requires it. The expense connected with them is a nominal one. The view that the New York Chamber of Commerce took on this subject was that if they get a dollar a day, the members thereof, they would be perfectly satisfied. You can say a cent a day. So the amount involved has no bearing whatever on it. But they are the fangs thrown out by the commission to help them get in all facts, to gather in the facts, to make only recommendations, and stop there. They are

simply a method for the purpose of helping them get down to the facts. The element is the facts.

There is this other element: They are able, independently, to reach the small—not ridiculing him—manufacturer, or commercial man who has had war contracts, who has not enjoyed close contact with the men of these Army boards, who is in a position, however, to have his remedy if it is necessary. He can get it more readily through this commission and this fact-determining agency independently than otherwise. In other words, though the New York Chamber of Commerce is very often looked upon as a body of very big business people, still in this case we are looking out for the little man, for the little man who is not able to help himself. And on further consideration in executive session, I am convinced that you will see my viewpoint as to that.

(Thereupon, at 12.15 o'clock p. m., the committee went into executive session and later adjourned until Tuesday, January 14, 1919, at 10.30 o'clock.)

# VALIDATING INFORMAL CONTRACTS.

TUESDAY, JANUARY 14, 1919.

UNITED STATES SENATE,
COMMITTEE ON MILITARY AFFAIRS,
*Washington, D. C.*

The committee met pursuant to adjournment at 10.30 o'clock a m., at the committee room, Capitol. Senator George E. Chamberlain presiding.

Present: Senators Chamberlain (chairman), Fletcher, Thomas, Beckham, Kirby, McKellar, Warren, Weeks, Sutherland, New, and Knox.

The CHAIRMAN. Gentlemen of the committee, we had up for consideration before the committee the other day this matter of contracts—those improperly executed, or the irregular contracts, and we agreed upon a measure to submit as a substitute for the Dent bill the one which came here from the House.

Since that action was taken I understand that gentlemen on both sides of the controversy, some of the contractors, or some gentlemen representing the contractors, and the War Department, desire to make statements about the matter regarding some defect in the bill that we have practically agreed upon. The committee will be glad to hear from the representatives of Mr. Crowell.

## STATEMENT OF MR. G. H. DORR, ASSISTANT DIRECTOR OF MUNITIONS, WAR DEPARTMENT.

Senator NEW. Will you please state whom you represent?

Mr. DORR. I represent Mr. Crowell, Assistant Secretary of War. I am the Assistant Director of Munitions, and he asked me to state his position. Mr. Crowell regretted very much that he could not be here personally, but he will leave what he is doing if the committee desire. However, I have familiarized myself with his views respecting the matter.

The bill as reported out by this committee is satisfactory to the War Department, as stated by Mr. Crowell when he was here last: that is, the bill that is now on the floor of the Senate, as I understand it. Since that time he was informed that certain suggested amendments in that bill have been made.

The position of the War Department on these suggested amendments has been set forth in response to a request for the views of our department by Senator Johnson, of California, in a letter which I would like to put before the committee. I think that letter states those views as concisely and as clearly as they can be stated.

Senator JOHNSON. You refer to the letter——

Mr. DORR. Of January 13, 1919, of Mr. Thelen.

The CHAIRMAN. You may read it to the committee.
Mr. DORR. It is as follows:

JANUARY 13, 1919.

Hon. HIRAM W. JOHNSON,
*United States Senate.*

MY DEAR SENATOR: In response to your request for my views on the amendment proposed last Saturday morning to S. 5261, the war-contracts bill, I beg to advise as follows:

1. Special privileges to favored contractors (sec. 3): The amendment provides that the contractors therein specified, being those who do not have valid formal contracts, shall have the right to appeal first to a war contracts appeals commission to be created by the bill and then to the Court of Claims. They will thus be given "two bites at the cherry" and the second bite with 75 per cent of the award in their hands.

No other contractor with the War Department has such a privilege. Contractors having valid contracts with the War Department can appeal only once from the War Department, i. e., to the Court of Claims and with no part of their compensation in their hands. No contractor with the Navy Department has two appeals nor do contractors with other departments of the Government have the right to try first one tribunal and then another in an effort to secure compensation higher than that which the department has found to be just and reasonable.

The effect of this amendment would be to grant special privileges to the contractors now asking relief from Congress, without any good reason for such favoritism.

To get as much of the working capital now tied up in these war contracts back into industry as speedily as practicable, the department has planned to make payments on account just as rapidly as individual items, such as labor cost and settlements with subcontractors, could be determined and in advance of the determination of those items that may demand more elaborate accounting and appraisal.

The amendment provides that as to the final settlement with each contractor the Department of Justice may, within 30 days after the War Department has tendered a contract or compensation, file notice of appeal with the chairman of the Appeals Commission. In view of the possibility of such appeal by the Department of Justice, no disbursing officer could with safety make any partial or final payment until the expiration of the 30-day period and no such payments would be made. In other words, the effect of this provision would be to defer for at least 30 days all payments to the contractors—

And I should say, making impossible partial payments on account—

The responsibility seems to be imposed on the Department of Justice of examining each claim to determine whether the adjustment is satisfactory to the Government. The magnitude of this task need not be dwelt upon. If the Department of Justice files notice of appeal whenever it has been unable to make sufficient investigation to satisfy itself that the interests of the Government have been fully protected, there will be further substantial delays in payment. In all such cases, even though the action of the War Department were finally fully sustained, the contractor could receive no payment whatever until the decision of the appeals commission had been rendered. Even though the contract tendered by the War Department provided for immediate payment of part or all the amount agreed upon, no payment could be made in whole or in part if the Department of Justice filed its notice of appeal.

These delays in payment are drawn to your attention for the reason that the War Department feels strongly the necessity of having payments made as promptly as is consistent with a satisfactory scrutiny of the claims, so that the moneys now locked up may be made available to reestablish industry and continue the employment of labor.

While the contractor may be able to secure an extension of credit on the basis of the award, and so avoid bankruptcy, his working capital even then remains locked up and can not be put at the service of the industry and labor of the country until after the whole proceeding is terminated.

2. Regional boards of examiners (sec. 3): The provisions for regional boards of examiners are apparently a more recent development of the original plan to have questions of fact arising out of war contracts decided by such regional boards consisting entirely of business men of the vicinity.

I refer to this matter now merely to draw attention to the facts heretofore made known to you, that the War Department now has at work 24 local claims boards in various sections of the country and 8 central claims boards in Washington; that these boards consist of representatives of the War Department and of business interests; that their members are well qualified to ascertain and report the facts; and that an additional system of regional boards is entirely unnecessary.

3. Affidavits (sec. 4): It is assumed that section 4, referring to the making of affidavits, refers to those classes of cases in which the officer named in the contract as contracting officer did not personally sign the same and did not take the oath of disinterestedness.

None of these officers are now engaged in settling these contracts. They are scattered over the United States, Europe, and perhaps Asia, and some are probably dead. In order to obviate the long delay in getting in touch with all these officers and to enable prompt payment to be made where proper, it is suggested that this section be amended so as to provide, in effect, that if the affidavits can not be secured with reasonable promptness from these officers there may be accepted in lieu thereof, in such instances in which it can be made, an affidavit of the contractor or an officer thereof (if a corporation) stating that the contracting officer of the Government was not directly or indirectly interested in the contract. If for any reason this suggestion is not satisfactory, it is hoped that some other solution may be worked out which will avoid the very long delays which would be inevitable under the section as now worded.

The following suggestions for action are respectfully submitted for your consideration:

(1) That section 3 of the proposed amendment referring to the Appeals Commission be eliminated.

(2) That if the committee is of the opinion that the contractors affected should have an appeal from the decision of the War Department, section 1 of the bill be amended so as to provide that jurisdiction is conferred on the Court of Claims to give equitable relief in all cases covered by the section.

(3) That section 4 be amended so as to provide some method of speedy action if the contracting officer can not be reached with reasonable promptness.

Mr. Benedict Crowell, the Assistant Secretary of War, has read this letter and authorizes me to say that it represents his views and the views of the War Department.

The opportunity to express these views is much appreciated. The undersigned will be very glad to supply to you or other members of the committee any information or assistance in his power.

Very sincerely,

MAX THELEN,
*Surveyor of Contracts and Assistant to the Director of Purchase, Storage, and Traffic.*

Senator JOHNSON of California. Mr. Chairman, permit me one word of explanation. On Saturday last when we were debating this matter, and when the representatives of the New York Chamber of Commerce had presented to us a scheme which was an amendment, or an elaboration of the bill reported by the Senate, I asked the question whether or not the War Department had been consulted and what the views of the War Department were? It developed that the department had not been consulted concerning the amendment, nor had it expressed any view, and so while we were in session I wrote a very brief note to Mr. Thelen, who had been in charge of that part of the matter at least, asking him to let me know what the department's views were as to the particular amendment presented by the New York Chamber of Commerce, and the clerk of the committee very kindly sent it down to the department for me. This letter was a response and came yesterday.

Mr. DORR. With respect to the suggestion that these holders of informal contracts should be placed in the same position as are other claimants against the Government, if the committee feels, as I gather

it does, that the holders of informal contracts and claimants under them should have the same recourse to some other tribunal than the War Department, it occurs to the department that the appropriate thing to do, and that which will involve the varying of the course which has heretofore been pursued by it—is to put them in the same position by a very simple amendment giving the Court of Claims jurisdiction to entertain a petition for equitable relief on those claims. That would put them in precisely the same situation as is every other person who has a claim against the Government.

The question has been raised, and was very carefully considered by the War Industries Board at the time this bill was being drawn—of course, the War Industries Board has been continually in touch with the industries that were affected by War Department contracts—and I am informed they considered the question whether the Court of Claims was in a position to handle claims of this character if such jurisdiction were given, and their investigation, as I understand it, and the investigation of the Attorney General indicated that the Court of Claims was in a position to handle the claims as presented. Of course, if it should prove that the claims growing out of this subject matter, and claims growing out of other subject matter, overburden the Court of Claims, why appropriate general relief can be given. The department, of course, gentlemen——

Senator NEW. That could be given by further legislation?

Mr. DORR. Yes, sir.

Senator NEW. But it would require further legislation?

Mr. DORR. My suggestion is merely this, that so far as at present appears the Court of Claims is able to handle these things as well as other claims that are before it. I understand that the War Department has satisfied itself as to that, and has also satisfied itself that there was no objection as far as the protection of industry, or affording any special relief in this particular class of contracts, are concerned. If the Court of Claims has not the facilities for handling the claims which are being presented by citizens, there would seem to be no particular reason for singling out a particular group of claimants against the Government and conferring a special privilege on them of what constitutes two appeals.

Senator KIRBY. And claimants who have no basis at all for compensation except through the favor of the Government in validating their contracts?

Mr. DORR. Yes; I think that is what led us to omit that provision as to the Court of Claims.

Senator JOHNSON of California. And the position you took, as I take it, is that a man with an invalid contract, who is accorded the favor of validation by this law, is granted greater rights by this law than the man who has a valid contract, and only a valid contract, to commence with; is that correct?

Mr. DORR. Precisely; that is unquestionably the attitude.

Senator JOHNSON of California. Se the man who has an absolutely valid contract, and who has been an original creditor in the first instance, is penalized because he has a valid contract?

Mr. DORR. Precisely.

Senator JOHNSON of California. And the man who has an invalid contract is given two rights of appeal, with the right of compensa-

tion, which are not accorded to a man with a valid contract; is that correct?

Mr. DORR. Precisely; and not accorded any other of the vast range of claimants against the Government.

Senator JOHNSON of California. I have no doubt it will be done, but it will not be done with one vote.

Senator FLETCHER. That was not the case under the Dent bill, the substitute for the Hitchcock bill.

Mr. DORR. As the bill is now on the floor of the Senate, that is not the situation.

Senator KIRBY. What bill do you refer to on the floor of the Senate—the House bill?

Mr. DORR. The one which I understand this committee reported out.

Senator KIRBY. We reported two bills out. You have reference to the last bill—the war-industries bill as amended?

Mr. DORR. Yes, sir; which was reported out.

Senator FLETCHER. The substitute for the Hitchcock bill.

Senator BECKHAM. And that is the substitute to which you suggest amendments, is it?

Mr. DORR. No, sir; we are not suggesting amendments to that.

Senator BECKHAM. The substitute meets the objections that you have to that?

Mr. DORR. Yes, sir; the objections which I am suggesting are to the proposed amendment to the bill as reported out by this committee.

Senator NEW. The amendments that you are suggesting here are to the bill which was substituted by this committee on Saturday afternoon?

Mr. DORR. Yes, sir.

Senator NEW. And for all bills which had preceded it?

Mr. DORR. Yes, sir; that states it correctly.

In response to a suggestion, as I understand it from Senator Chamberlain, Mr. Defrees yesterday took this matter up and suggested that the inequality might be somewhat cured by extending the scope of this appeals commission to a still further class and that is, to the holder of the War Department's valid contracts. Frankly, that does not seem to us to be the right way to approach the situation. That is the mere enlargement of the favored class, because it leaves all other claimants against the Government, the vast range of them, discriminated against, and, frankly, it is difficult for us to see why a claimant against the War Department should have rights which claimants against the Navy Department have not, or claimants against the Treasury Department or the Interior Department or any other department have not. The machinery which has been set up, if I may say so to the committee, we believe to have been as carefully designed as in the nature of things it could be to give the contractor a fair hearing on this matter, both as to valid and invalid contracts.

The CHAIRMAN. May I ask you this: Is the War Department satisfied with the bill that we were going to substitute for the Dent bill, which we considered last Saturday; is the War Department satisfied with all of that bill down to section 3?

Mr. DORR. Yes, sir.

The CHAIRMAN. Then you object to the commission that has been created for appeals; you object to the form of affidavit which has been added to the final section?

Mr. DORR. We think that the provision with respect to the affidavit might be clarified. We do not object to the affidavits being given.

The CHAIRMAN. In other words, the War Department prefers that the whole machinery for the adjustment of these claims, valid and irregular contracts, shall be vested entirely in the War Department and those agencies as now created.

Mr. DORR. We suggest that if the committee sees fit, the same provision as to the jurisdiction of the Court of Claims could be extended to these informal contracts as already exists as to valid contracts, and that otherwise the contractor of the War Department would be in the same position that the contractors with the Navy Department are in, or with the Interior Department, or any other department.

The CHAIRMAN. When Judge Defrees and Mr. Thelen came up to see me the other day I suggested that they get in touch with each other and undertake to formulate that appeals section—section 3—in such a way as would meet the wishes of both the War Department and the contractors, but even you two gentlemen seem to be unable to agree. Now, you have got this committee of 19 to undertake to agree, and if you can not agree, it is pretty difficult for this committee to get together and know just exactly what is to be done.

Mr. DORR. Mr. Chairman, as to that I may say that the difficulty is that it does not seem to us that any provision for appeal is necessary, because those who deal with the War Department should be put in the same position as any other claimant.

The CHAIRMAN. There is quite a general feeling, I think, in Congress amongst those whom I have discussed the subject with that the War Department, having made all of these contracts through its agencies, or having failed to make contracts at all, ought not to be the sole arbiter in the matter of validating and passing upon contracts which they have improperly made, but that there ought to be some tribunal aside from them to consider those cases.

Mr. DORR. May I say this in reply to that, Mr. Chairman: The problem that arises under these contracts is not any new problem in the history of the Government. It is precisely the same situation that we have had ever since this Government began.

An executive department enters into a contract with a private individual. Subsequently the executive department seeks a modification, we will say, of that contract or seeks to make an adjustment, particularly with regard to supplies which it desires to have furnished, or a particular harbor which it seeks to have dredged, or what not. The particular shape in which it desires to have the bill becomes unnecessary when it desires to modify that contract, because under the law and practice from time immemorial it has been the custom of the executive departments, when the contract is not going to be carried out as originally planned, for it to suggest or offer a basis of settlement to the contractor, and the contractor either accepts that basis of settlement or, if he does not regard it as acceptable, he proceeds to the Court of Claims.

Now, that is precisely the situation that we have throughout all the departments of the Government to-day. The Navy Department is adjusting contracts; the Shipping Board will undoubtedly have things to adjust respecting contracts, and it is no new problem and it is not particularly confined to the War Department. The principle which has hitherto prevailed in the whole history of the Government is that the executive departments are charged with the duty of effecting that adjustment.

Senator McKellar. Do you know that in 1898, after the Spanish-American War, there was a commission created to adjust these kinds of contracts in the War Department?

Mr. Dorr. Informal contracts.

Senator McKellar. All contracts.

Mr. Dorr. I understood that there had been some such institution.

Senator McKellar. Then you see that that would not bear out your statement.

Mr. Dorr. I understood it was very limited.

Senator McKellar. It was limited just exactly as this is limited, the same kind of commission.

Senator Kirby. I think the department's objections are well taken to this bill. A man who has an informal contract with the department, who had authority to make a contract, ought not to be put in a better position by the law than if he had made a valid contract, and we have trusted the machinery of the Government to settle and adjust all contracts that have not been performed that were valid, and we ought to trust it to adjust those that were not valid at all. I understood from Judge Defrees the other day that the War Department was in harmony with this contract that you offered here on the part of the War Industries Board, am I mistaken about that?

Mr. Dorr. Yes; I will say——

Senator Kirby. I asked the question, and I understood it in that way. I probably ought to say that.

Mr. Defrees. The day you speak of we were considering the War Industries Board bill, and I stated—and Mr. Crowell was here and can verify my statement—that it was satisfactory to the War Department, and I understand it still is. The matters under discussion are the sections added to that.

Senator Kirby. By the committee.

Mr. Defrees. Which broadens it, creating this commission. That is what the objection is, to the appeals commission.

The Chairman. In other words, the contracts were satisfactory under the War Industries Board bill without the appeals clause added?

Mr. Defrees. Some of them would. I could explain it if I had the opportunity.

The Chairman. Then we will let you be heard now, Mr. Defrees, if Mr. Dorr will suspend.

Senator Kirby. Have you finished, Mr. Dorr?

The Chairman. We will suspend with Mr. Dorr for a minute until we hear Judge Defrees's statement.

## ADDITIONAL STATEMENT OF MR. JOSEPH H. DEFREES, OF CHICAGO, CHAIRMAN OF THE EXECUTIVE COMMITTEE, WAR SERVICE COMMITTEES.

Mr. DEFREES. Mr. Chairman, when we were here several days ago—and when I say "we" I mean the executive committee of which I am chairman—was here urging the War Industries Board bill, we presented that and urged that as a proper bill to effect the proper relief; that was our view. We had not been impressed at that time with the necessity of the appeals situation. Sitting in the audience, intending to be presented and to be heard upon the question, was Mr. Cohen, representing the New York Chamber of Commerce. Some of the Senators called attention to that. Immediately after the hearing Mr. Cohen and Mr. Symington and Mr. Green, representing the contracts association, and Mr. Cohen, representing the New York Chamber of Commerce, and ourselves, talked here in the hall and agreed to have an immediate conference to see whether or not we were in all accord. Judge Cohen was earnestly in favor of the Hitchcock bill as it then was, because it did permit this civilian board of appeals. After discussion, we agreed that we would all join Judge Cohen; we agreed that we would all join in supporting the War Industries Board bill, if the rest would join in having the commission constituted—an appeals commission—instead of the commission as it was in the Hitchcock bill.

We were opposed to the Hitchcock bill, because we felt that the War Department could dispose of the elements of its contracts without difficulty and immediately, and we disliked very much to bring in a new element. So we made that compromise. I at once drafted a bill in which I stated the situation and the reasons for it, and gave these added sections, which you considered Saturday, to every Senator who is a member of this committee. I gave it to messenger and sent it down here. Unfortunately, it was at the time of the Roosevelt funeral and it did not come to your attention until after you had acted upon our previous arguments.

Judge Cohen came to you and secured his hearing, adding this section 3 referring to the appeals commission. He had left it with us when he went to New York, at the time we first agreed, to adapt the Hitchcock bill, containing a suitable provision as to the appeals commission, to the War Industries Board bill. We made that adaptation, but in our judgment—and when I say "our" I mean my committee's judgment—there was no necessity for the provision that the Department of Justice should also have a right of appeal, and we left out the words "Department of Justice," which had been included at Judge Cohen's request, and immediately wrote him to that effect and sent him a copy of it.

We felt that it was not necessary or desirable, and for this reason: That, in the first place, it was a branch of the Government that was acting when the War Department acted. In the next place, the commission itself provided that it should be composed of two members of the Government, in effect; in other words, one represented the War Department, one represented the Department of Justice, and one general business. So the commission itself practically had the effect of giving the Department of Justice the right of appeal,

two members being governmental officers satisfactory to the Senate, and one of them to the War Department and the other to the Department of Justice.

Late at night Judge Cohen hunted me up and told me he had been arguing the matter with various members of the Senate committee; that he had seen that the Department of Justice would have the right of appeal under the bill as he proposed it, with section 3 added, and that he would be very much embarrassed and humiliated before the committee unless we consented to insert the words "War Department." I considered, as far as I was concerned, as the only question the Government being protected in that respect and Judge Cohen being protected from embarrassment by reason of his previous statement.

There was not time to confer with the War Department. When Judge Cohen was making his argument to you here the next day for this section 3, which I regard as a valuable and proper addition to the bill—the chairman will bear me out in saying that I asked that the War Department representatives be sent for, and in addition to that we caused a member of one of the committees of the War Department to be notified that the matter was on, because we wanted the benefit of the criticism of the War Department upon the situation. In my representation I simply represented the public generally and what I conceived, or what my committee conceived, a just authority to represent the public interests, and I did not want anything done that the War Department did not know about, or, at least, had the opportunity to be heard upon, and we would try to consider it just the same as you would consider it.

Senator KIRBY. Why should a man who has an invalid contract——

Mr. DEFREES. I am coming to that, Senator, if you please.

Senator KIRBY. Very well.

Mr. DEFREES. When you had agreed, and we could not get the War Department representatives here, we went down to the War Department for the purpose of calling their attention to what had been done for the purpose of urging that they join us in support of the matter, or if they could not, to tell us why. Mr. Dorr pointed out, I think with accuracy, that the bill as drafted, if it left the Department of Justice with the right of appeal, would stop payment upon account for items which were settled. He said, of course, he could not be placed in the position of urging that there be no appeal from the War Department's action, and he called our attention to this fact: That many of these informal contracts had many elements in them, and it would take a long time, or might take a considerable length of time, to reach an adjustment upon each of the elements involved in an informal contract so that it could be put into the formal contract and tendered, which would be the first time that the appeals provision as it was originally worded could operate; and that they, of course, could not make payment on account of items which were adjusted, and many of which could be adjusted readily, as long as this right of appeal existed. That impressed us as proper criticism of the bill as it was.

We do not know—we have not the slightest view of all the intricacies that are involved in the War Department's operation—that is, the large view that they have. Mr. Thelen, a representative of

the War Department, whom we also saw, suggested also that if the bill remained in this way it gave the informal contractors the right of appeal to this commission, which formal contracts would not have, and the formal contracts would have to go to the Court of Claims. That occurred to us also as a matter which ought not to be.

Senator McKellar. You will recall that in the Hitchcock bill they were all required to come before the commission.

Mr. Defrees. Yes, sir.

Senator McKellar. And that ought to be the case in this instance.

Mr. Defrees. Now, that being so, we suggested to the gentlemen representing the department—Mr. Dorr and Mr. Thelen—that a remedy could readily be accomplished, first, by amending section 3 so as to cover the two provisions; in other words, taking out the right of appeal of the Department of Justice, which was not in our judgment of consequence, because the commission itself, or the majority of it—two members of it were members of the Government, one representing the War Department and the other representing the Department of Justice, and the original decision was the Government's own decision. Next we felt that that would permit partial payments to continue, and then we suggested that we felt that the provisions in section 3 should be so broadened as that formal contracts also should be included in this same privilege.

Senator Kirby. In other words, you think that if a man who has an informal contract is given the privilege of its being validated, and there is a special tribunal for the adjustment of it, that you are willing for the fellow who had the formal contract to also have that additional advantage in order to get both advantages to themselves?

Mr. Defrees. No, sir.

Senator Kirby. But does it not mean that?

Senator McKellar. No; it puts them on an equality.

Senator Kirby. Certainly it puts them on an equality, but you are proceeding here to extend a special favor to a man who has not a valid contract, and then you are providing special remedies for him that are better than those remedies provided for the man who has a valid contract, and to justify you in giving him a special advantage you say that you are willing to extend it to the man who already has a valid contract, too?

Mr. Defrees. I would rather explain my own position, if you please.

Senator Kirby. But is not that the effect of it?

Mr. Defrees. I do not think so.

Senator Kirby. I simply wanted to give you my view of this.

Mr. Defrees. I hope your views will be modified, because they are not the proper deductions. Your statements of fact are entirely accurate, of course. We are not merely willing that these formal contracts shall be included in this right of appeal; we are anxious to have justice——

Senator Kirby. Why are you anxious?

Mr. Defrees. Because this applies to both formal and informal contracts. One of the greatest things that will be accomplished by this bill, in addition to immediate payment, is the psychological

effect on contractors of the country and the bankers in whose hands they are. The entire country has understood from time immemorial that when you got to the Court of Claims it was your grandchildren who got the result and not yourself, and they would know that that would be the state of affairs unless this type of relief were granted.

Now, these contracts are in the millions, or at least there are hundreds of thousands of them rather, more than were given by the War Department in any previous time. The necessities of the situation were such that the patriotic contractors had to accept informal demands. They are entitled to just as much, and, in fact, more careful consideration than the man who formally signed his signature to a formal contract with which he expressed his satisfaction, because they have to trust to what the War Department would do for them afterwards. Now, they are all on a parity, and we would have inserted this in the beginning if the matter had occurred to us.

Senator KIRBY. Why should you be on more than a par?

Mr. DEFREES. We would not be on more than a par.

Senator KIRBY. Why should you change the other man's position and make it better as against the Government and put him on a par with you when we are granting a special privilege?

Mr. DEFREES. Because justice needs to be done; because the country needs immediate relief.

Senator KIRBY. Certainly.

Mr. DEFREES. And it can not have it with an appeal to the Court of Claims. There was received from the clerk of the Court of Claims the other day an informal letter in which he stated that the Court of Claims was still functioning on claims growing out of the Civil War.

Senator KIRBY. They may not have settled them, but they are not wasting much time on them.

Mr. DEFREES. So we have submitted both of these amendments which we have suggested.

Now, at the suggestion of Senator Chamberlain, to whom we came telling of these objections of the War Department, we felt that they ought to be made to the entire committee, and we came and asked that there be a hearing given in respect to these objections of the War Department, which we were in sympathy with. The difference between the views expressed by Mr. Dorr and myself are not as to results to be accomplished, but as to the method of accomplishing them. We feel that the methods we propose are sufficient. The method of handing stone where bread is needed is pursued in the Court of Claims.

Senator KIRBY. It is the usual method, though.

Mr. DEFREES. But there never was such a situation as this before, and let us hope there never will be. Now, Senator Chamberlain said to Mr. Thelen and myself—Mr. Thelen representing the War Department—that we should get together and try to amend this section 3 so that it would meet the objections of the War Department. That was at 12 o'clock on yesterday. Mr. Thelen and I made an appointment at 2 o'clock yesterday and we were there all the afternoon until nearly 6 o'clock. Up to that time we had drafted our provisions and submitted them to them and the War Department, through Mr. Thelen, and Mr. Door advised us that they wanted to consider our amendments overnight. We asked them to tell us if they would not accomplish the result and if they knew of any fact which would not

be covered by this situation, and we asked for an appointment this morning at 9 o'clock, and we got there this morning and remained there until the time to come here to this committee. There was nothing further, you see, in respect to them. We assumed that they had stated their entire objection to these amendments in the statement which has just been made. They do not say, as I understand it, that it will not cover the situation to allow all contractors to be treated alike, and they do not say, so far as they have yet expressed themselves, that it will interfere with the workings of the War Department. If by any chance it shall we, of course, are as anxious as any member of this committee can be that it should be stated, and we are anxious that it shall be remedied.

The CHAIRMAN. Let me ask you this: You seem to have been steadily at work since 2 o'clock yesterday in undertaking to reach an agreement with respect to this matter. Do you think you can reach an agreement with the War Department as to its substitute for this section 3, if you have more time?

Mr. DEFREES. I am sure we could not reach an agreement on any substitute except the one which sends it to the Court of Claims: do I quote you correctly, Mr. Thelen?

## STATEMENT OF MR. MAX THELEN.

Mr. THELEN. On the subject of the desirability of having a tribunal to which these people can go for relief, I suggest that it be a tribunal to which all other contractors of all other departments of the Government can go, that is the Court of Claims; and we suggest, furthermore, that if the Court of Claims as now constituted can not handle these cases—although the War Industries Board has reported to us that they can—but if they can not, then we suggest that the proper thing to do is to enlarge the membership of the Court of Claims and remove every other obstacle so that they can do it.

The CHAIRMAN. What is your particular objection to the form of appeal as covered by this bill, Mr. Thelen?

Mr. THELEN. We have several objections. They have been stated in part by Mr. Dorr. One of them is that as the bill was originally presented here last Saturday it clearly was discriminatory in character, because it gave to these informal contractors rights which those contractors who have legal claims do not have.

The CHAIRMAN. But that could be avoided by slight amendments, could it not?

Mr. THELEN. No; I beg your pardon, it has not been provided for in all the amendments that Mr. Defrees proposes, and for this reason, that he proposes, in order to get these people an appeal to this particular commission, that we also take in those who hold legal contracts of the War Department; but we still have a situation as to those who have contracts from the Navy Department, the Interior Deparment, and the Shipping Board, and from every other department——

The CHAIRMAN (interposing). This committee does not have anything to do with that.

Senator MCKELLAR. No; not a thing in the world.

Senator KIRBY. That is only suggested to show that you are changing the entire machinery for the adjustment of claims against the Government on account of contracts made with a governmental de-

partment for the benefit of a few men who do not have valid contracts with the Government.

Senator McKellar. We are doing the same thing as was done in 1898.

Senator New. Now, Senator Kirby, your assumption there is, as I take it, that those men who have these informal contracts are seeking a rather unfair advantage. I think you put them in the attitude here that they ought not to be compelled to occupy. The fact that these contracts are invalid, they are not responsible for. They believed them to be valid when they accepted them, or if they——

Senator Kirby (interposing). Conceding that——

Senator New (continuing). But if there was any doubt whatever in their minds as to their entire validity, they assumed that all doubt would be settled justly and without delay on the part of the department.

Senator Kirby. Conceding all that——

Senator New (interposing). And they are the people who are here now, asking not for special relief but that some way be found to put themselves on a par exactly with the people who have valid contracts.

Senator Kirby. Now, that is just exactly what I am trying to get at; because they thought they had a valid contract and had a bona fide intention of making a valid contract, do you think they are entitled to more consideration in settlement than those people who did have valid contracts, and are they not asking for more consideration here and a different tribunal to adjust the matter in?

Senator New. I think this, Senator Kirby, that their's is the situation that demands some sort of adjustment. The other does not. We are not trying to settle the case of a man here who has a valid contract that does not call for anything. It is this very unusual situation that has arisen that calls for something that will enable these men whose contracts are invalid to be given prompt relief.

Senator Kirby. Certainly, but do not give them any more chance than they would have had if they had a valid contract.

Mr. Thelen. You have asked me the reasons, and I have stated one of them. I should now like to state another, and that is that if this proposition is adopted in the form in which it was suggested last Saturday, these contractors will have five appeals, and I want to explain that situation. First you go to the local district boards, which have been established by the War Department. Those boards consist in part of the representatives of the Government and in part representatives of business men who sit on those boards. If the contractor is dissatisfied with their award he can appeal to the central claims board of the particular department in Washington. That is the second board. If he is still dissatisfied with that award, he can then appeal to another board which has been constituted in the War Department and which consists of civilians, known as the Board of Contract Adjustments. I think it consists of civilians.

It is true that those men have the rank of lieutenant colonel, but that is so that they can administer oaths; otherwise they would not have that power, but they were taken from civil life and by instinct and training are civilians. If a contractor is still dissatisfied with

that third tribunal, then under this bill he comes before this commission, and if he still is dissatisfied he then can go to the Court of Claims. So he has five bites at the cherry.

Now, it seems to us that when the War Department has established carefully effective machinery, such as it has, consisting in part of business men and in part of civilians, and when in addition to that the contractor in this case is given the same right which other contractors have had from the foundation of the Government, he has the right to go to the Court of Claims, where full justice has been done to them.

Now, Mr. Chairman, I just want to emphasize one further point that Mr. Dorr made, and that is this: The War Department has been consistent in its attitude toward this matter from the beginning. From the very beginning we have favored, and we now favor, the bill that is lying on the table in the Senate; that is, the War Industries Board bill. If it is desired to give to the contractor this tribunal, we then suggest an amendment to section 1 of that bill providing that he can go to the Court of Claims, just where he would have gone if he had had a valid contract.

The War Industries Board, we think, is entitled to considerable consideration. The War Industries Board represents the industries of the country. The War Industries Board works together so that those who represent the Government and those who represent the industries might agree, and we do agree, and I understand that the War Industries Board feels about this bill just as we do.

The CHAIRMAN. Let me call your attention to one matter. That bill which was reported out from this committee as a substitute for the so-called Hitchcock bill, was inadvertently reported; that is, it was not printed correctly. The bill that we are going to report out is the bill that we agreed upon on Saturday without section 3.

Mr. THELEN. May I suggest, Senator, that as far as that goes the War Department is entirely satisfied with those rather minor changes that were made in the so-called War Industries Board bill.

The CHAIRMAN. So that instead of the substitute bill being the correct one, the bill that we intended to report out was the same as was agreed upon Saturday without section 3.

Mr. THELEN. Without section 3 and just a slight change in section 4.

The CHAIRMAN. Is there anything further to be said about this matter, because we will consider it in executive session.

Mr. DORR. May I say one word in conclusion? In talking this matter over with Mr. Crowell yesterday afternoon, after Mr. Defrees had suggested this to meet the objections which had been raised, this extension of the privilege to all contractors who hold valid contracts: that is, those who have contracts with the War Department, not those with contracts with other departments, Mr. Crowell said this: We had had a meeting during the afternoon with the chairmen of the various adjustment boards with a view to determining just how rapidly the process of adjustment was going, just what was being done, and he referred to that and said, "it appeared at that meeting this afternoon that we have already concluded negotiations with a vast number of contractors." Now, this suggestion of Mr. Defrees puts the contractors who have not yet concluded their negotiations

upon an entirely different basis from those who have already concluded them.

Mr. DEFREES. How?

Mr. DORR. By giving them a resort to a tribunal which contractors who have already acted did not have.

Senator SUTHERLAND. They would still have that, would they not?

Mr. DORR. I do not suppose they would. They have agreed on the terms of settlement.

Senator MCKELLAR. If they are satisfied why should anybody else be dissatisfied?

Senator WEEKS. If they are satisfied with the terms of settlement there is nothing else to be said.

Mr. DORR. The only answer to that is that it seems to me that while it is true they have agreed to that, if they adopt the position of these other contractors they might have felt like taking the chance of seeing if they could not get something additional, in the first place, by going to this appeals board, on which there is, as the bill provides, a representative of the business interests; and, again, by going with 70 per cent of that in their pockets to the Court of Claims. It undoubtedly puts them in a different position; that is, the bill as it stands now proposes to give these two additional appeals and the last appeal to the Court of Claims and puts the claimant in a position which no other claimant against the Government occupies; that is, it puts 75 per cent of his claim, or his award, in his pocket at the time he is prosecuting that claim, and therefore naturally it tends toward litigation.

## STATEMENT OF MR. N. W. APPLETON, NEW YORK.

Mr. APPLETON. Mr. Chairman, may I give you a message that Mr. Jules Henry Cohen gave me to deliver to this committee to-day?

The CHAIRMAN. Yes.

Mr. APPLETON. He says that after reflection and after having a great deal of discussion since Saturday on this bill, he still believes that the agreement or conclusions that you gentlemen arrived at last Saturday are the correct ones. He does not object if the words "Department of Justice" are stricken from the third paragraph of this proposed bill, but he does believe that they ought to be there just the same, though he has no objection to their being stricken out. He still believes that there is no favoritism as to these so-called invalid contracts, because, as the bill stands, without paragraph 3, the provision of the commission, it leaves entirely within the power and discretion of the War Department the interpretation of the last three lines of the first paragraph, namely:

> Provided he [the Secretary of War] finds that such waiver is not inconsistent with the public interest; and in this event the said agreement shall have the same validity and effect it would have had if such statutory requirement had been complied with.

Now, if there were not this provision for this appeals commission it would be very easy for a person who is suffering from the need of money to carry on his business to be compelled to take most any sort of settlement that was offered to him, because his only alternative would be to go to the Court of Claims; and you gentlemen

must keep in mind, as I know you do, the fact that this is an extreme emergency. The Court of Claims was never created with any idea that they would have any but the number of cases that might possibly need to go before them for adjustment, and that is the reason this commission is sought to be created now. I am sure that Mr. Cohen wanted me to say to you that undoubtedly other claims against the Government will arise which could be referred to this commission for adjustment and report back to Congress, so that you would be setting in motion the wheels now, the machinery that would carry out the whole proposition as it was ultimately presented, and he feels, and expresses in that feeling the sentiment of the New York Chamber of Commerce, that the appeals commission is vitally necessary in this bill.

## STATEMENT OF MR. JOSEPH H. DEFREES—Resumed.

The CHAIRMAN. Now, Judge Defrees, you may continue.

Mr. DEFREES. Mr. Chairman, I shall take up only a very few minutes more of your time.

No contractor would ever agree to a settlement or want to go to this appeals commission unless he had agreed under constraint—under the constraint of the fact that he has got to do what the War Department says, which would not be so under other circumstances. The same thing applies to Mr. Thelen's suggestion about these successive appeals. They all of them going along to people who are under the supreme direction of somebody above them in the military service. It has that fault, and while we have no reason to state it as a positive fact—we do not want to say that we have heard that the department has been unfair, and we do not expect it to be unfair—still we do say that it is always a possibility, and we do say that the spirit of the country, the psychology of this whole situation, depends upon this appeals feature.

The CHAIRMAN. I have not been satisfied with any explanation given me as yet for putting these men in uniform who are to serve as civilians on the adjustment board. Mr. Thelen says, and it is the first time I have heard that intimated, that they were made lieutenant colonels for the purpose of administering oaths. They could have been made notaries public for that purpose.

Mr. THELEN. We did not look into that particular phase of it, but when the question came up of appointing the board of appraisers to appraise property taken over by the Government, the office of the Judge Advocate General gave very careful consideration to that question as to whether there should be civilian members in the Military Establishment.

The CHAIRMAN. Our experience with men in uniform is that, although there is no intention to be unfair, there is a disposition upon the part of the minor officers not to talk about anything that occurs, as they are restrained by a superior. I should like to know why it was found necessary to put these men in uniform.

Mr. THELEN. Frankly, the reason I gave you is the reason, because there is a provision in the statute to the effect that an officer of the Army has the right in any inquiry or investigation to administer oaths, and it was that provision which was relied upon when the

appraisers were appointed, and the same provision was relied upon when this board was appointed, and that is the only reason why they were put in uniform.

The CHAIRMAN. I have heard that those men who come from civil life have regretted very much that they were directed to put on uniforms, because they could not talk.

Mr. THELEN. Frankly, I should prefer to have them civilians.

Senator MCKELLAR. Is that not in direct opposition to the order of the War Department that no more commissions should be given during the armistice?

Mr. THELEN. No, sir; those were given before. In fact, this board was created several months before the armistice was signed.

Senator MCKELLAR. How long has it been since these men were commissioned?

Mr. THELEN. I think it was a month before the armistice was signed; I am not sure as to the date.

Senator SUTHERLAND. If they are employed to administer oaths, are they not under all other regulations provided for officers in uniform, and under direction and control of the War Department officials—both military and civil?

Mr. THELEN. I have not given any consideration to that.

Senator KNOX. I would like to ask you a question. I have been necessarily detained by the Committee on Privileges and Elections, and perhaps this has been already disposed of, but speaking now entirely from recollection, it is within the discretion, as I recall it, of the Secretary of War to waive these irregularities; he may, or he may not, waive them. If he thinks it is contrary to the public interest he will not waive them. Now, what appeal does a man have who has a contract where he would not waive the irregularities? He could not go to the Court of Claims, as it is only the judicial questions that can go to the Court of Claims. If he has no appeal, he has come to the end of his string.

Mr. DORR. The suggestion of the department as to that is that in that event he should be allowed to go to the Court of Claims, and the Court of Claims could be given jurisdiction to award him equitable compensation for the service he has performed and the expenditures he has made.

Senator KNOX. Even as against the decision of the Secretary of War that it was contrary to the public interest to give him any status at all?

Mr. DORR. If he has actually rendered the service. The judgment of the Secretary would merely go to whether it was desirable to reinstate that particular contract, and that the contract may be so phrased that the contractor under it would accept the provisions that were made in one of the old forms of contracts, and the contractor may be willing to do what contractors universally are doing, namely, accepting a reduction of work—a reduction of unnecessary work.

Senator KNOX. Under this, you see, these people, by reason of not having a valid formal contract, can not go into any court, and under this statute they can not go into any court unless it is approved by the Secretary of War, and the court then provided for them is the commission in the War Department. If he refuses the award it seems to me he has no remedy at all.

Mr. DORR. I think that is true as the bill stands, and I think it is true as to the bill as framed by Mr. Defrees, probably, but the suggestion that we would make would be conferring the right to go into the Court of Claims for equitable compensation.

Senator KNOX. The question in my mind is whether when a political department of the Government has certified that it is contrary to public interest to recognize a claim, whether as a judicial question the jurisdiction of it is given to the court.

Mr. DORR. I do not believe that question could be, but I think the court could be given equitable jurisdiction. That is what we are suggesting—to give equitable compensation for the service he has actually rendered and the expenditures he has actually made at the instance of the Government; and in that respect the suggestion we make is, of course, very much more for the protection of the contractor or the holder of these informal contracts than the suggestion made by Mr. Defrees, because the bill as it now stands I do not think accomplishes that purpose, and I do not think it can accomplish it.

Mr. THELEN. Mr. Chairman, in order that the record may be complete as to the language of this statute, it is section 183 of the Revised Statutes, and that is the statute on the foundation of which jurisdiction is given the members of boards in the Contract Adjustment Division.

Mr. DEFREES. We have copies of this bill here with this amendment that I suggest for the members of the committee.

The CHAIRMAN. I suggest that you furnish that to the clerk in such words as you desire, so that there will be no confusion afterwards. I have a copy of one that you prepared here the other day.

Mr. DEFREES. I mean a copy with these amendments in the bill, providing that it shall include in the appeals commission the right of the formal contract or legitimate contract as well as the informal contract.

Senator MCKELLAR. I want to say to Judge Defrees that I am not at all satisfied with regard to section 4, and I desire to have a conference with him about it.

The CHAIRMAN. I will say that the committee will take this matter up and give it full and thorough consideration. We will take up this contract matter in executive session. Representative Saunders, of the House, is here upon a matter of his own, and the committee will hear him.

## STATEMENT OF MR. EDWARD D. ROBBINS.

The CHAIRMAN. Mr. Robbins, have you seen the last draft of the proposed bill we have discussed, for validating contracts?

Mr. ROBBINS. I have just been looking at it.

The CHAIRMAN. Did you want to criticize it in any way or offer suggestions with reference to it?

Mr. ROBBINS. I had intended to speak about the House bill. My criticism I intended to direct to that.

Senator BRANDEGEE. I wish you would direct your criticism to the House bill. I think we had better have in mind what your criticism of one feature of the House bill is, as it is very vital, in my opinion.

Senator MCKELLAR. Are you in favor of or against the House bill?

Mr. ROBBINS. I want to point out what is evidently a failure to carry out the real intent of Congress. I am not criticising it except in one respect that I consider very vital. I might make other criticisms.

Senator MCKELLAR. Go as far as you like.

Mr. ROBBINS. However, I should prefer to confine myself to the one point. The body of the bill provides for empowering the Secretary of War to adjust, pay, or discharge these informal agreements. Then follow certain provisos. Of course, the positive clauses of the bill have no effect where limited by the provisos.

The first proviso is the one that I wish to criticise.

Senator MCKELLAR. What is the number of that House bill?

Mr. ROBBINS. No. 13274. The proviso reads:

That payment under such agreement shall not exceed the fair value of the property transferred or delivered and accepted by the United States, as determined by the Secretary of War, and where no property has been transferred, delivered, or accepted, payment shall not be in excess of the actual cost incurred in preparation for performance, as said cost is determined by said Secretary.

Now, let me take a case, which is a common case, where an agreement is in part performed. Take the case as with us: The contract was, we will say, for 20,000 automatic rifles; 5,000 have been delivered and the other 15,000 are in course of manufacture. Now, where no property has been transferred, why, then, it is permitted to indemnify the contractor for the preparation for performance, which often has been under the immediate direction of the War Department, and very elaborate. But here is a case that does not come under that clause, because no property has been delivered and in that case, in accordance with the natural meaning of the words, no payment can be made exceeding the fair value of the property delivered; in other words, they could get pay for the 5,000 guns, but not 1 cent of pay for all the work they have done on the other 15,000. That is what those words mean.

The CHAIRMAN. On the other hand, if none of the 20,000 guns had been delivered, you would have been compensated for all?

Mr. ROBBINS. Yes, sir; but if we had delivered a few, we can not get that.

The CHAIRMAN. That evidently is not what is intended.

Mr. ROBBINS. No; that evidently is not what is intended, and it is only that it seems to me that it is so exceedingly important that I asked for this hearing.

The CHAIRMAN. You represent the Marlin Arms people?

Mr. ROBBINS. Yes, sir; this does not affect us as much as others, because we have, generally written contract, but I think you gentlemen should know this, that there are a whole lot of little factories there that are nearly bankrupt, because they can not get money. They go to the banks and ask for accommodation, and the banks want to know if they are going to get paid by the Government, and they have to satisfy the banks in this respect, and unless this language in this bill is made clear, so that the banks will know that they are going to get their money, and the Government is going to be fair to these people, these little factories will be bankrupt.

The CHAIRMAN. Suppose a firm had contracted for $100,000 worth of property and had made a very large expenditure in preparation

and had actually delivered $5,000 worth of that property; do you mean to claim, under the Dent bill, they could not receive any compensation under those circumstances for any cost of preparation?

Mr. ROBBINS. Yes, sir.

The CHAIRMAN. But, on the other hand, they would be paid only for the $5,000 worth delivered, which might not compensate for the cost of preparation.

Mr. ROBBINS. Yes, sir.

Senator BRANDEGEE. Do you care to read to the committee the proposed proviso which you have prepared as a substitute for the proviso at present in the House bill, and leave it with the committee?

Mr. ROBBINS. Yes, sir; but of course this is only a suggestion, and it can be amended in a great many ways. I read the debate in the House with great interest, and I thought the main trouble in the House was that they were afraid that somehow or other prospective profits would be paid. Nobody wants anything of that kind, and therefore I drew up a proviso, to make that clear, and yet not have the outrageous result apparently accomplished by that bill. I will read it to the committee:

*Provided*, That no adjustment of or payment under any such agreement shall include any allowance for property transferred or delivered to and accepted by the United States beyond a reasonable compensation therefor, as determined by the Secretary of War.

May I stop there to say that this bill says it shall not receive anything more than a fair value. I would like to ask the committee what the value of a gas mask is to-day. "Compensation" is what you mean.

Senator THOMAS. We might use them in the Senate occasionally.

The CHAIRMAN. I think they would talk through them.

Mr. ROBBINS. You use the word "compensation" in your bill. That is the proper word, of course. Then I put on another provision, which is my suggestion to help remove some of the troubles in the minds, evidently, of the Members of the House:

Nor any allowance whatever in case of the suspension, cancellation, or termination of any such agreement, before its complete performance on the part of any other party thereto for any loss of prospective profits which might or would have accrued to such party from work not actually performed, or from the delivery of property not actually acquired by such party.

That is volunteered as my suggestion.

The CHAIRMAN. Have you looked over the bill which was submitted to you a little while ago, which is now being discussed as a solution and substitute for the Dent bill?

Mr. ROBBINS. Yes, sir.

The CHAIRMAN. How does it strike you?

Mr. ROBBINS. Very much better than the House bill.

Senator MCKELLAR. Do you like the 75 per cent proposition in it?

Mr. ROBBINS. Personally, I do not care very much about the appeal. Our case is very clear and we expect no trouble with the Secretary of War. May I explain that most of the work done has been done on procurement orders. This was the modus operandi. I will give one case as an illustration. The Marlin Arms Corporation was asked to produce, as quickly as they could, 20,000 machine guns. Everybody was crying for them and they received a verbal order,

with a complete agreement as to all the terms, in September, 1917. There was not anything left, you understand, to be discussed any further—all the terms were agreed on. Now, the next step under the rules of the War Department was to issue what is known as a procurement order. That would constitute, in commercial life, a written contract, because it is a definite order accepted in writing by the contractor. That procurement order was delayed for some reason quite unknown to us, until March, 1918.

Now, under the practice of the War Department, that procurement order is followed, and should be followed within a week by a contract, a form of which I have here. This is the form of contract [exhibiting].

That was submitted to us and we understood just what the contract was going to be and we were given to understand we would get it within a week. It was a mere matter of some lawyer in the legal department making the procurement order and filling out the blanks in it and having it signed. That is all there was to it. That contract in this form, has not yet been signed, although the rifles have long since been made and paid for.

Senator BECKHAM. You mean machine guns?

Mr. ROBBINS. Yes, sir; automatic rifles—machine guns.

Senator BECKHAM. Made and paid for?

Mr. ROBBINS. Yes, sir.

Senator MCKELLAR. Without a contract?

Mr. ROBBINS. Without a contract.

Senator MCKELLAR. You had nothing except the procurement order?

Mr. ROBBINS. Yes, sir; that is a typical case.

The CHAIRMAN. There are many like that?

Mr. ROBBINS. Oh, I think in the vast proportion of cases where there is trouble, under the ruling of the Solicitor of the Treasury, the cases are exactly that.

Senator MCKELLAR. There were procurement orders in all cases, do you think?

Mr. ROBBINS. There are cases which are like the situation described in that contract, between September, 1917, and March, 1918. They came to us and said "You must not wait; you must go ahead; we must have the machine guns." They agreed absolutely on all the terms. That, however, was by correspondence and part oral, but in the main in writing, and that procurement order should have come through immediately.

The CHAIRMAN. I think you should have brought it to their attention immediately.

Mr. ROBBINS. If we had been disposed to insist on legal protection, of course, we would not have done anything, and you would not have had any machine guns. I say absolutely if the contractors who furnished the machine guns, which you know were very much needed, had waited until the final contract in this form was executed, you would not have had any machine guns in France.

The CHAIRMAN. We did not have enough anyway.

Senator THOMAS. I do not think there is any room for argument. The proposition is that these men came to the front, and, by God, they should be paid.

Mr. ROBBINS. We will not have the slightest difficulty in settling with the Secretary of War. Personally, I do not care about the appeal. I wish we had some of the letters we received from those Army officers, thanking us for what we had done.

The CHAIRMAN. You are with the Marlin Arms people?

Mr. ROBBINS. Yes, sir. May I make one other suggestion?

The CHAIRMAN. Certainly.

Mr. ROBBINS. I would suggest, where you have the words "in good faith," that you add immediately following the words "done work."

The CHAIRMAN. That is in the bill we are now discussing?

Mr. ROBBINS. Yes, sir; and if I were drafting this bill, instead of saying "and the same has not been reduced to contract form," I would change that, because I consider a production order in contract form. That is a legal contract according to common law.

The CHAIRMAN. I think the bill is broad enough to cover even a verbal contract.

Mr. ROBBINS. Yes, sir; I think it is. I think the words "done work" should be put in.

Senator BRANDEGEE. As I understand you, the Remington people are in the same situation?

Mr. ROBBINS. The Remington people are in the same situation—I think they are in a much worse situation than we are, because, as I say, we have, in most cases, contracts under which we could, in a large measure, get out. It is not merely the Remington people with big contracts, but it is the thousands of little fellows who will suffer.

I wish to thank your committee very much for its courtesy and kindness in hearing me.

(Whereupon the committee went into executive session, after which the committee adjourned.)

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